

# Customs Bulletin

Regulations, Rulings, Decisions, and Notices  
concerning Customs and related matters



## and Decisions

of the United States Court of Customs and  
Patent Appeals and the United States  
Customs Court

Vol. 13

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No. 9

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THE DEPARTMENT OF THE TREASURY  
U.S. Customs Service

## NOTICE

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# U.S. Customs Service

## *Treasury Decisions*

(TD-79-58)

### Foreign Currencies—Variances From Quarterly Rate

Rates of exchange based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in T.D. 79-16 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Switzerland franc:

February 1, 1979-----	\$0. 584795
February 2, 1979-----	: 585138

(LIQ-3-O:D:E)

Date: February 9, 1979.

BEN L. IRVIN,  
*Acting Director,*  
*Duty Assessment Division.*

(T.D. 79-59)

### Foreign Currencies—Daily Rates for Countries not on Quarterly List

Rates of exchange based on rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, People's Republic of China yuan, Philippines peso, Singapore dollar, Thailand baht (tical)

The Federal Reserve Bank of New York, pursuant to section 522 (c), Tariff Act of 1930, as amended (31 U.S.C. 372 (c) ), has certified

buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to part 159, subpart C, Customs Regulations (19 CFR 159, subpart C).

People's Republic of China Yuan:

January 29-31, 1979-----	\$0. 630636
February 1, 1979-----	. 628773
February 2, 1979-----	. 626881

Hong Kong dollar:

January 29, 1979-----	\$0. 2102
January 30, 1979-----	. 2103
January 31, 1979-----	. 2101
February 1, 1979-----	. 210050
February 2, 1979-----	. 2094

Iran rial:

January 29, 1979	
through-----	MA
February 2, 1979	

Philippines peso:

January 29, 1979	
through-----	\$0. 1360
February 2, 1979	

Singapore dollar:

January 29, 1979-----	\$0. 4627
January 30, 1979-----	. 4632
January 31, 1979-----	. 461250
February 1, 1979-----	. 459550
February 2, 1979-----	. 457675

Thailand baht (tical):

January 29, 1979	
through-----	\$0. 0488
February 2, 1979	

(LIQ-3-O:D:E)

Date: February 9, 1979.

BEN L. IRVIN,  
Acting Director,  
Duty Assessment Division.



(T.D. 79-60)

**Countervailing Duties—Bicycle Tires and Tubes From Taiwan**

Notice of American manufacturer's desire to contest countervailing duty determination

**AGENCY:** U.S. Customs Service, Department of the Treasury.

**ACTION:** Notice of desire to contest determination made by the Secretary of the Treasury under 19 U.S.C. 1303.

**SUMMARY:** This notice is to advise the public that the Secretary of the Treasury has received notification of an American manufacturer's desire to contest the final negative countervailing duty determination with respect to bicycle tires and tubes from Taiwan.

**EFFECTIVE DATE:** Feb 20, 1979.

**FOR FURTHER INFORMATION CONTACT:** R. Theodore Hume, Office of the Chief Counsel, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; 202-566-5476.

**SUPPLEMENTARY INFORMATION:** On January 8, 1979, a "Final Countervailing Duty Determination" was published in the Federal Register (44 F.R. 1815). In this notice it was announced that "it is hereby determined that benefits have been paid by the Government of the Republic of China on the manufacture/exportation of bicycle tires and tubes, but that the benefits involve an aggregate amount considered to be de minimis in size, and that therefore no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303) \* \* \*".

Notification was received by the Secretary of the Treasury on January 10, 1979, that the Carlisle Tire and Rubber Co. of Carlisle, Pa., an American manufacturer of the same class or kind of merchandise as that described in the above determination, desired to contest the determination.

In accordance with the provisions of section 516 of the Tariff Act of 1930, as amended by the Trade Act of 1974 (19 U.S.C. 1516), notice is hereby given that an American manufacturer has informed the

Secretary that it desires to contest the determination with respect to bicycle tires and tubes from Taiwan.

February 13, 1979.

Approved:

ROBERT H. MUNDHEIM,  
*General Counsel of the Treasury.*

G. R. DICKERSON,  
*Acting Commissioner of Customs.*

[Published in the Federal Register Feb. 20, 1979 (44 FR 10450)]

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(T.D. 79-61)

### Antidumping—Steel Wire Rope From Republic of Korea

Notice of American manufacturer's desire to contest fair value determination

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of desire to contest a determination made by the Secretary of the Treasury under 19 U.S.C. 160.

SUMMARY: This notice is to advise the public that the Secretary of the Treasury has received notification of an American manufacturer's desire to contest a determination made under the Antidumping Act of 1921, as amended, with respect to steel wire rope from the Republic of Korea.

EFFECTIVE DATE: Feb. 20, 1979.

FOR FURTHER INFORMATION CONTACT: R. Theodore Hume, Office of the Chief Counsel, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; 202-566-5476.

SUPPLEMENTARY INFORMATION: On November 27, 1978, a "Determination of Sales at Not Less Than Fair Value" relating to steel wire rope from Korea was published in the Federal Register (43 F.R. 55306). This notice announced the determination that steel wire rope from Korea is not being, nor is likely to be, sold at less than fair value, within the meaning of the Antidumping Act, 1921, as amended (19 U.S.C. 160 et seq.).

Notification was received by the Secretary of the Treasury on December 19, 1978, that the Broderick and Bascom Rope Co. of St. Louis, Mo., an American manufacturer of the same class or kind of merchandise as that described in the above determination, desired to contest the determination.

In accordance with the provisions of section 516 of the Tariff Act of 1930, as amended by the Trade Act of 1974 (19 U.S.C. 1516),

notice is hereby given that an American manufacturer has informed the Secretary that it desires to contest the determination with respect to steel wire rope from Korea.

February 12, 1979.

R. E. CHASEN,  
*Commissioner of Customs.*

Approved:

ROBERT H. MUNDHEIM;  
*General Counsel of the Treasury.*

[Published in the Federal Register Feb. 20, 1979 (44 FR 10451)]

## Customs Service Decisions

The following are decisions made by the U.S. Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

Dated: February 8, 1979.

LEONARD LEHMAN,  
*Assistant Commissioner,  
Regulations and Rulings.*

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(C.S.D. 79-45)

### Value: Dutiability of Royalties Paid Pursuant to Copyright Agreement

Date: September 28, 1977

File: R:CV:V

541549 SPK

DEAR —: In reference to your submissions on behalf of (client) we have enclosed a copy of a recent Headquarters ruling concerning royalties.<sup>1</sup> The enclosed ruling discusses the dutiability of royalties paid pursuant to trademark agreements. Accordingly, the enclosed ruling will govern those situations in which your client has entered into trademark agreements.

We are of the opinion that an analysis similar to the one which we have afforded trademarks should be utilized when dealing with copyrights. We are cognizant of the fact that there is a fundamental distinction between trademarks on the one hand and copyrights on the other. Copyright law deals with written expressions and the communication of ideas reduced to tangible form. Trademark law is not concerned with the content of words or even the development of new technology (which patent law is concerned with), but rather with the protection of identifying symbols. When reviewing royalties

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<sup>1</sup> The ruling referred to is published as C.S.D. 79-46, immediately following.

paid pursuant to copyright agreements the nature of the royalty agreement will determine whether or not that royalty forms part of dutiable value. Those royalties paid pursuant to copyright agreements, that are in essence merely for the use of a concept or idea which will aid in selling the particular commodity in the retail market in the United States, are not dutiable. These copyright royalties are analogous to royalty payments made pursuant to trademark agreements and are not dutiable, inasmuch as the Customs Service views these types of expenses as selling expenses incurred by the importer in the United States. However, those royalties that embody more than just an aid in selling that item in the United States, and actually constitute either the item itself, or an essential portion thereof, will be considered dutiable. The test thus, is whether the royalty is paid for an inherent concept or idea which actually constitutes the item itself, or a significant portion of that item, or whether the royalty is merely a selling expense of the importer in the United States.

Consistent with the foregoing, we view the application of our guidelines in the following manner. An importer who has contracted with a manufacturer to have certain items produced also might contract with Walt Disney Productions, or some like licensor, to utilize its characters to aid in selling that item. The utilization of these readily recognizable characters will only superficially alter the appearance of that particular item. The intrinsic value of that item remains the same. For example, a game that utilizes the Disney characters to portray the moving pieces in that game, or a stuffed animal produced in such a manner that it resembles a readily recognizable character such as Donald Duck, or other types of merchandise that employ a picture of Mickey or Minnie Mouse (such as children's handbags, tee shirts, etc.), will be viewed by the Customs Service as nondutiable royalties. These royalties will merely aid in the selling of the particular item in the U.S. retail market. However, royalty payments to an author for use of his manuscript in having his book produced abroad, or to a music writer for production abroad of his musical composition in the form of sheet music, will be viewed as dutiable royalties. These payments are made for the very thing that is being produced and imported, for example, a story or a song.

The initial burden of identifying those royalties which he believes are not dutiable falls to the importer. The appraising officer will then determine whether those royalties so identified are, in fact, nondutiable.

(C.S.D. 79-46)

## Value: Dutiability of Royalties Paid Pursuant to Trademark Agreement

Date: Oct. 13, 1977  
File: R:CV:V SPK  
541445

To: District Director of Customs, Seattle, Wash. 98104.

From: Director, Classification and value Division.

Subject: Reconsideration of internal advice decision 290/75; dutiability of royalties.

This is in reference to your memorandum of March 23, 1977, in which you forwarded a reconsideration request submitted by (law firm) in the above-noted internal advice. The issue presented for our review is whether or not certain royalty payments made by (the licensee) to (the licensor) for the use of the trademark (name) form part of the dutiable value of the imported merchandise which bears the trademark.

In reviewing our decision in this matter we have broadened the scope of our review to include not only the instant royalty agreement but the recent decisions issued by headquarters regarding royalties.<sup>1</sup> Our delay in responding to your memorandum was necessitated by our desire to give a thorough and complete analysis to this complicated area of the law. In doing so we have entertained comments from several interested parties concerning the dutiability of royalties.

Our previous decision in this matter, I/A 290/75, referenced 540871 and dated December 1, 1976, and a follow up letter to (law firm) dated January 19, 1977 (referenced 541382), concluded that the royalty payments in this case were dutiable.<sup>2</sup>

The merchandise in this case, men's leisure sports shirts, is manufactured in Hong Kong by a party unrelated to the importer. Furthermore, the manufacturer is unrelated to the licensor. Pursuant to an agreement entered into between the licensor and licensee which became effective as of January 1, 1972, the licensee was granted a nonexclusive, nontransferable license to use the trademark(s) in connection with,

<sup>1</sup> The following recent rulings regarding royalties significantly expanded the concept of the dutiability of royalties. They are I/A 215/75, ref. 540803 of Apr. 12, 1976; I/A 216/75, ref. 540804 of May 25, 1976; I/A 290/75, ref. 540871 of Dec. 1, 1976, and letter ruling ref. 541293 of Jan. 3, 1977. These royalty decisions were reviewed simultaneously since the issues were very similar. Accordingly to the extent that any of them are inconsistent with this ruling they are hereby overruled.

<sup>2</sup> The Jan. 19, 1977, letter was written at the request of (law firm). They requested reconsideration of I/A 290/75 in light of the then recent Customs Court decision in *Imperial Products*, C.D. 4672, decided Nov. 5, 1976. It was our opinion that the court's decision did not require a different result and accordingly we reaffirmed our prior decision.

inter alia, the manufacture and sale of certain designated products. The agreement also provides that those products which bear the trademark(s) shall meet certain standards and specifications developed by the licensor. With this factual background noted, headquarters issued I/A 290/75. We concluded that these royalty payments were dutiable since they constituted costs of manufacturing, as that term is defined in *Ford Motor Company v. United States*, 29 Cust. Ct. 552, A.R.D. 9 (1952), and *Goodrich-Gulf Chemicals, Inc. v. United States*, 66 Cust. Ct. 509, R.D. 11733 (1971). Furthermore, we were of the opinion that the payments were also for an integral part of the manufacturing process—quality control. At that particular time it was our understanding that the quality control took the form of substantial in-house testing and sampling of all licensed items. We believed that this further supported our opinion that the royalty payments were dutiable.

However, after reviewing not only all the Customs Court cases concerning the issue of royalties,<sup>3</sup> but also treatises and court cases concerning the nature of trademarks, we are modifying our position concerning royalties. Accordingly, the type of royalties described below will not be considered dutiable and, significantly, the royalty under consideration in this matter will not be considered dutiable.

Initially we want to emphasize that royalty payments made for processing techniques, equipment, know-how, technical assistance, designs, and other types of production "assists" required to produce imported goods are dutiable.<sup>4</sup> Essentially then, what the royalty payment is made for will determine whether or not that payment constitutes part of dutiable value. As elaborated below we are now satisfied that the instant royalty payment is in essence a selling expense incurred by the importer in the United States.

In our previous rulings, when we found royalty payments such as this one dutiable, appraisalment was to be made pursuant to constructed value (sec. 402(d) of the Tariff Act of 1930, as amended). Since the royalty payments were not made to the foreign manufacturer, export value was ruled out, inasmuch as the prices paid to the foreign manufacturer did not include what we considered an essential element of value. U.S. value was ruled out for a similar reason. Thus,

<sup>3</sup> Though there have been numerous Customs Court cases concerning the dutiability of royalties, the vast majority of them concern royalty payments made pursuant to a patent agreement. It is well established that there is a fundamental distinction between a patent and a trademark. See McCarthy, "Trademarks and Unfair Competition," sec. 6 (1973). In a sense it was our understanding of the differences between these terms that led to a change in our position. *A. W. Fenton Co. Inc. v. United States*, 52 Cust. Ct. 405, R.D. 10660 (1964) and *H. M. Young Associates, Inc. v. United States*, 61 Cust. Ct. 642, R.D. 11695 (1970) were cases that discussed royalties paid pursuant to trademark agreements. However, in our opinion the decisions in those cases are not controlling in this matter.

<sup>4</sup> At this time we note that subsequent submissions made by the importer and its counsel has established that there was no substantial in-house testing or other "assists" furnished to the manufacturer. Succeeding portions of the ruling will address this point.



appraisement was made pursuant to constructed value and the royalty payments were included in the dutiable elements of constructed value. However, since we now rule that these royalties are not dutiable, in the absence of another missing element of value, or other circumstances to obviate export value, appraisement can be made pursuant to sections 402(b) and 402(f)(1)(B) to establish export value.

We now turn to our analysis of the nature of a trademark. It is our further understanding of the rights and privileges that are conveyed under trademark law that have led to the overruling of our prior position. A trademark is a word, name, symbol, or device, or a combination thereof, adopted and used by a manufacturer or merchant to identify his goods and distinguish them from goods manufactured or sold by another (15 U.S.C. 1127). Use requires affixation of the mark to the goods and distribution in commerce (15 U.S.C. 1127).

Both Federal and common law trademarks are acquired in the United States by putting the mark on a product and selling that product in commerce, and a trademark can only be acquired in the United States by both affixation and distribution, *G. Leblanc Corp. v. H. & A. Selmer, Inc.*, 310 F. 2d 449 (7th Cir. 1962); *Pacific Supply Corp. v. Farmers Union Central Exch., Inc.*, 318 F. 2d 894 (9th Cir. 1963). A trademark on a product, essentially, tells the public that buys the product that the product so marked is up to the standards the public expects from products so marked. *Jean Patou, Inc. v. Jacqueline Cochran, Inc.*, 201 F. Supp. 861 (S.D.N.Y. 1962). The trademark right is the right to preclude others from using confusingly similar marks (*Garcia v. Montecrispi Cigar Co.* 409 F. 2d 14 (7th Cir. 1969)) in the territory (15 U.S.C. 1127).

Furthermore, a trademark is territorial in nature. 15 U.S.C. 1127. Being territorial, a trademark can only be of value in the territory in which it exists. If one has used and registered a trademark in the United States, the use and registration do not cause any rights to accrue in any foreign country under that mark without there being either use of registration in the foreign country, *American Foods, Inc. v. Golden Flake, Inc.*, 312 F. 2d 619 (5th Cir. 1963). Consequently, where there is no right to preclude, the mark is of no value in the foreign country. It is quite conceivable, to have made and sold a product for a long period of time in the United States and to be faced with an identical mark owned by a third person when sales are attempted in a foreign country. In such a case, the mark is of a negative value; for the goods cannot be sold using it.

If only a U.S. trademark has been obtained, then no infringement can take place and no right can be exercised without use (distribution) in the U.S. territory. Manufacture outside the United States cannot be



an exercise of a U.S. trademark right because it satisfies neither criteria. For example, manufacture without sale in Hong Kong probably cannot even violate a Hong Kong trademark, let alone a U.S. trademark.

Thus, the essence of a trademark is its value to the licensee in the country of use (in this instance, the United States). Under this analysis, clearly a trademark is a selling expense of the importer in the United States. A trademark has been described as enabling the manufacturer (or his licensee) to "reach over the shoulder of the retailer and across the latter's counter to the ultimate consumer." Callman, "Unfair Competition, Trademarks and Monopolies" (3d ed. 1967) page 12. We believe that such an expense should form no part of dutiable value, since its essence is that of a selling expense of an importer in the United States.

An understanding of why a licensee is willing to pay for the right use a trademark is itself further evidence as to why payments for such rights are not dutiable. The value of the trademark is based on consumer recognition of the merchandise bearing the trademark. By paying the royalty fee, the licensee is paying for the right to benefit from the fact that the article he wishes to sell has been advertised within the United States and has a certain consumer recognition. The royalty payment can thus be viewed as a marketing, selling, or advertising expense. If a party imported the exact same article without an attached trademark he would have to expend additional money to advertise that article within the United States. This line of reasoning is thus analogous to the court's decision in *C. J. Tower & Sons of Buffalo v. United States*, 65 Cust. Ct. 792, A.R.D. 277 (1970) aff'd 60 CCPA 54, C.A.D. 1079 (1973), where the court held that advertising expenses in the United States bar no relation to the cost of manufacturing imported merchandise. In this case the court stated the following:

A reading of the record will leave no doubt that selling and advertising expenses were not incurred by Studebaker of Canada "(b)ecause SASCO, the American Company", in the words of one witness, "engaged in its own selling and advertising efforts in the United States \* \* \*." On the basis of the records before the court, the evidence is overwhelming that Studebaker of Canada incurred no "warranty cost", and no selling and advertising expenses in connection with the exported automobiles since these costs or expenses were borne by SASCO in the United States. The court, therefore, on the record before it, must find that these items are not a part of the cost of production of the exported automobiles, and should have been excluded in computing "cost of production" under the pertinent statutory provision.

Furthermore, the Court in *New York Credit Men's Adjustment Bureau Inc. et al. v. United States*, 64 Cust. Ct. 770, R.D. 11715 (1970) aff'd 68 Cust. Ct. 319, A.R.D. 301 (1972) held that selling expenses which are properly part of constructed value are those incurred in selling the merchandise for exportation to the United States and not those for reselling in the United States. Similarly, we believe a payment by an importer to a licensor for a right to sell the importer's product under a given trademark is not a dutiable element.

The next portion of the ruling discusses the relevancy of the "right to manufacture" language that is found in many of the royalty agreements. As was noted earlier the existence of this language in the instant royalty agreement was given great weight when we reached our previous determination that the royalty was dutiable. Furthermore, in I/A 216/75, headquarters held that certain royalty payments were dutiable because "in addition to the right to sell the trademarked articles, the importer is given the all-important right to manufacture trademarked articles." After reviewing the pertinent law concerning this clause, as well as the rationale for inclusion of the clause, we are of the opinion that this clause is merely "boilerplate" without commercial significance. At this juncture, however, we emphasize we are referring to those agreements that in "essence" grant the licensee the right to sell the imported product in the United States. We refer back to our statement in the beginning of this ruling that when "assists" are furnished, the royalty payments will constitute part of dutiable value.

Our present understanding of the functions and intricacies of trademark law have aided our understanding of the "right to manufacture" clause. Any person has the right and capability to manufacture and sell a trademarked article in a country other than the United States, since he will not infringe on the rights of the U.S. holder of the trademark (assuming the country of manufacture does not have a treaty with the United States). In the absence of a treaty provision, a trademark has no validity outside the United States (see "Trademarks," 87 C.J.S., sec. 7d). Not only is the right granted by the licensor to manufacture a trademarked article not an all-important right, in many situations it is not a right which the licensor can provide. The owner of a trademark "has only the right to prohibit the 'use' of it so as to protect the owner's good will against the 'sale' of another product as his." *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125, 67 S. Ct. 1136 (1947). The nature of the trademark right is that the trademark owner has "used" the mark in commerce and that the owner has not abandoned the use of the mark. (See "Trademarks," 87 C.J.S., sec. 7, sec. 23, sec. 182.) The concept of use necessarily implies that the holder of the mark has used that mark in

commerce. Any person can manufacture an article and place another person's trademark on that article. So long as the manufacturer does not sell the article containing the mark or otherwise use the mark in commerce in a territory subject to the trademark provisions, the person manufacturing the article has not engaged in any prohibited practice. In reality, therefore, the right to manufacture a trademarked article is no right at all. A party can manufacture a trademarked article without being granted the right to manufacture.<sup>5</sup> The essence of the royalty agreements concerning trademarks, being one of a selling expense incurred in the United States, means that these expenses should not form part of dutiable value. Thus, the "right to manufacture" for Customs purposes is merely boilerplate language.<sup>6</sup>

Furthermore, we believe that much of the type of inspection and sampling that the licensor undertakes pursuant to the "quality control" provision in trademark agreements is analagous to those inspections by employees of the importer that have been historically held nondutiable. See *The Olga Co. v. United States*, 71 Cust. Ct. 42, C.D. 4468 (1973); *Styles for Boys, Inc., James G. Wiley Co. v. United States*, 62 Cust. Ct. 772, R.D. 11617 (1969), aff'd 64 Cust. Ct. 857, A.R.D. 272 (1970) *United States v. Dalminster, Inc., R. W. Smith*, 47 Cust. Ct. 577, A.R.D. 135 (1961) (U.S. value). Thus, in our opinion, a "quality control" provision in the absence of significant testing or other assist type functions performed by the licensor, which are not performed by the manufacturer for himself, cannot justify dutying the royalties.<sup>7</sup>

However, at this point we add yet another word of caution concerning situations where the licensor might furnish assists. If the licensor was to furnish designs or aid in design development, then most certainly these types of activities would be dutiable.

On the basis of our discussion thus far you would be required to find the instant royalty nondutiable. However, we do not believe that the discussion would be complete unless we address ourselves to several other significant issues that were raised in our previous royalty decision.

The existence of a minimum payment clause, in the agreements that were the subject of I/A 215/75 and I/A 216/75, were stated as justification for dutying those royalties. In I/A 215/75, the Customs Service

<sup>5</sup> Note the significant distinction between the rights granted pursuant to a trademark and the rights granted pursuant to receiving a license to use a patented process. The latter is unequivocally a dutiable element, whereas the nature of the former is one of a nondutiable selling expense incurred by the importer in the United States.

<sup>6</sup> We are cognizant of the fact that the clause might have significance insofar as it is necessary to insure tax benefits for the licensor.

<sup>7</sup> Since every agreement will contain quality control provisions (for reasons noted later in the ruling), the importer will have to represent to the Customs Service, through an affidavit or similar device, that no assists were furnished to the manufacturer pursuant to the quality control provision.

stated that "the inclusion of a minimum payment in a royalty agreement is unquestionably the price paid for the right to manufacture and and sell the trademarked articles." I/A 216/75 stated that "the fact that a minimum payment is guaranteed the licensor regardless of the existence of any sales reinforces the presumption that the sale is not the most important aspect of the transaction."

As discussed above, the right to manufacture the merchandise is not of commercial significance. The minimum payment is not made for the manufacture merchandise. In reality, a minimum payment clause is placed in many royalty agreements merely to insure the licensor that the licensee will, at the very least, commence sales, of the merchandise in order that the licensee can recover the payment. A guaranteed minimum payment can be considered as payment for the right to start selling rather than as a right to manufacture. We would not rule that all royalty agreements with minimum payment clauses are dutiable and those without such clauses are not dutiable. We must look at the commercial reality of royalty agreements and must recognize that a minimum payment clause is merely a commercially useful and acceptable method of payment contained in many royalty contracts.

Though never specifically stated in our previous royalty decisions, implied in those decisions was the proposition that "a nonexclusive right to sell" is dutiable since the receiving of one is an essential step in the manufacturing process. Without first purchasing the right to sell the concerned merchandise, that merchandise would not be manufactured. Thus, the "right to sell" is an essential step in having the imported merchandise produced. However, we now believe that this is an incorrect line of reasoning. Unequivocally, there are certain types of expenses that are not considered dutiable and must be incurred before merchandise is entered into the Customs territory of the United States. Among these expenses are the payment of Customs duties, ocean freight expenses, and the payment of foreign export taxes.<sup>8</sup> Therefore, simply because an expense has to be incurred prior to the importation of merchandise into the United States, it does not follow that the expense is dutiable. (Note the Tariff Act, 19 U.S.C. 1526, Lanham Act, 15 U.S.C. 1124, and the Customs Regulations, pt. 133, forbid importation of trademarked articles). Furthermore, the granting by a licensor of a right to sell a trademarked article in the United States does not forbid a manufacturer from producing that merchandise. He is permitted to sell the merchandise anywhere else in the world, and, for that matter, is not forbidden from producing the merchandise, so long as he does not sell it in the United States.

<sup>8</sup> It is widely accepted that Customs duties and ocean freight expenses form no part of dutiable value. Furthermore, *International Packers, Limited v. United States*, 52 Cust. Ct. 518, R.D. 10724 (1964) held that foreign export taxes are not part of constructed value.

We note that the physical attachment of the trademark to a product is accomplished at nominal cost, which is always included in the charges made by the foreign manufacturer. This, the cost of affixing the trademark is included in the manufacturer's price. Furthermore, if the manufacturer has the obligation to pay for the trademark, this cost would be a selling expense that the manufacturer would pass to its customers. Where the importer or its customer pays someone other than the manufacturer for the right to use a trademark, which may even be affixed after the manufacture of the merchandise to be trademarked is completed or even after importation into the United States, this cost is not a dutiable expense. It is a selling expense of the person who pays it. Thus, it is the selling expense of the purchaser, the U.S. importer or its customer, and is a selling expense incurred in the United States. This line of reasoning is consistent with the court decisions in this area. In *H. M. Young Associates, Inc. v. United States*, 64 Cust. Ct. 642, Reap. Dec. 11695 (1970), the Customs Court expressly held that "a royalty which is not paid by the manufacturer of the merchandise or which is not included in the cost of materials to him or his general expenses does not form part of constructed value under the statute."

In sum we note the following principles concerning the dutiability of royalty payments for trademarks.

1. Royalty fees paid by the manufacturer are dutiable and should be included in his selling price. If not included, that price cannot be used to establish export value.

2. Royalty fees paid by an importer that are in essence selling expenses of the importer in the United States are not dutiable despite the existence in the contract of "right to manufacture" clauses or quality control provisions. Furthermore, a minimum payment provision, will not justify dutying the royalty payments.

3. Royalty fees that are paid for the furnishing of an essential cost of production, or "assist", are dutiable. The furnishing of information concerning processes necessary for production, and substantial testing by the licensor, are examples of costs that are properly includable in dutiable value.

A copy of this ruling is being circulated to insure uniformity of appraisal.

(C.S.D. 79-47)

## Marking: Gold Necklace or Bracelet Chains

Date: August 7, 1978

File: MAR-2-05-R:E:R

709188 AB

This is in reply to your letter of May 10, 1978, regarding the country of origin marking requirements for certain imported gold chains for use as necklaces and bracelets. A sample flat spacer ring accompanied your letter.

You indicate that a flat spacer ring is usually attached between the clasp and the chain, and the ring is stamped with the country of origin (of the chain, presumably), Italy. In many cases the fine gold content is also shown with a carat or a decimal equivalent stamp.

Section 304 of the Tariff Act of 1930, as amended (19 provides in general that all articles of foreign origin imported into the United States must be marked in a legible and conspicuous manner to indicate the English name of the country of origin to the ultimate purchaser in the United States.

The sample consists of a single oblong-shaped gold link unattached to a piece of jewelry. The link is approximately one-quarter of an inch in length and three-sixteenths of an inch in width. The country of origin marking is engraved in letters approximately one-thirty second of an inch in size and one-eighth of an inch long. The Customs Service is of the opinion that the tiny marking of the flat link is not conspicuous enough to indicate the country of origin of the imported chain, since the marking would not be found easily by an ultimate purchaser looking at the jewelry.

Section 134.44 of the Customs Regulations explicitly provides that marking by means of string tags is an acceptable method of indicating country of origin, so long as the tags are affixed in a conspicuous place and so securely that, unless deliberately removed, they will remain on the article until it reaches the ultimate purchaser (19 CFR 134.44). This method of marking would, in our opinion, satisfy the requirements of section 304. Alternatively, if the chain were imported in individual packages, marking the packages would be acceptable.

We are enclosing, for your further information, a copy of section 304 of the Tariff Act and the applicable Customs Regulations.

(C.S.D. 79-48)

## Copyright: Application of "Manufacturing Clause" to Book Printed in England

Date: August 7, 1978

File: CPR-5-R:E:R

709251 O

In your letter of June 28, 1978, on behalf of the Mormon Church you asked if the Bible aid project now being prepared for publication will be subject to the "manufacturing clause" restrictions of the Copyright Revision Act of 1976 (17 U.S.C. 601-603). We understand that the printing and binding of the deluxe edition, which is to be imported, will be done by Cambridge University Press in Cambridge, England. You enclosed a 16 page sample of the annotated text of the King James version of the Bible, as it will appear in the publication, including chapter headings and footnotes.

We understand that the work will run somewhere between approximately 2,100 and 2,700 pages. The approximate page breakdown will be as follows:

King James version of the Bible, old and new testaments, chapter headings and footnotes.....	1, 625	to	1, 750	pages
Topical guide, perhaps combined with a concordance.....	300	to	650	pages
Bible dictionary.....	110	to	160	pages
Glossary.....	8	to	16	pages
Appendix.....	20	to	48	pages
Maps.....	16	to	24	pages
Preliminary pages.....	16	to	24	pages
	<hr/>			
	2, 095	to	2, 672	pages

The Bible, of course, is in the public domain. You believe that the Bible dictionary and the glossary are also in the public domain. The topical guide, the maps and the preliminary pages will be in copyright, as may also be the appendix.

In general, section 601(a) of the Copyright Law prohibits the importation and public distribution in the United States of a work authored by a U.S. national or domiciliary consisting preponderantly of nondramatic literary material that is in the English language, unless the portions consisting of such material have been manufactured in



the United States or Canada. Where the work consists only partially of material protected by the manufacturing clause, the test is whether the work consists "preponderantly" of the protected material. The manufacturing requirements do not extend to public domain material or to works consisting preponderantly of public domain material. Moreover, they do not extend to a work containing copyright-protected material and public domain material "unless such (copyright-protected) material exceeds the exempt material in importance." Sen. Rep. 94-473 at pages 148-149, House Rep. 94-1476 at pages 166-167.

In this case, we are of the opinion that the Bible and the other material that is in the public domain exceeds the copyright-protected material in importance. Thus, the work, as a whole, will not be considered to consist preponderantly of the copyright-protected material. Accordingly, we are of the opinion that the Mormon Church Bible aid project, printed and bound in England and bearing the notice of copyright, would not be prohibited entry into the United States by the manufacturing clause of the Copyright Law.

A copy of this decision is being circulated to all Customs officers for their guidance.

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(C.S.D. 79-49)

**In-Bond Merchandise: Recovery of Merchandise After Unauthorized Delivery; "Intact" Defined**

Date: August 8, 1978

File: ENF 4-01 R:E:E

305996 W

DISTRICT DIRECTOR OF CUSTOMS,  
*Philadelphia, Pa. 19106.*

DEAR SIR: This is in reference to your request for internal advice dated May 12, 1978, on the definition of the word "intact" as found in section 18.6(c), Customs Regulations, with reference to the retrieval of cargo subsequent to unauthorized delivery to the consignee. Your memorandum cites a difference of opinion at the district level as to whether certain penalty actions should come under the purview of section 18.6(c) or 18.8(b)(3).

Section 18.6(c) refers to the situation in the preceding paragraph (18.6(b)) where there is a shortage of one or more packages of in-bond merchandise or non-delivery of an entire shipment of the same to Customs at the port of destination whereupon inquiry by the carrier discloses that the merchandise has been delivered directly to the consignee. Where the merchandise cannot be recovered "intact"



under these circumstances specified in paragraph (b), section 18.6(c) provides for rejection of an entry covering such merchandise and requires that demand be made for liquidated damages for the same. As defined in paragraph (b), merchandise is considered as recoverable "intact" when none of the packages have been opened, which, of course, is a condition which will assure that no merchandise has been received in violation of the terms or conditions of the bond. Section 18.8(b)(3) provides for the amount of liquidated damages to be assessed where section 18.6(c) is invoked.

In both hypothetical situations set forth in your memorandum, the merchandise would be subject to the provisions discussed above because in both situations the usual procedures for examination and quantity verification were not made before the violation, and therefore Customs cannot assure that the same amount of cargo sent in bond was received, notwithstanding the close or even exact match of figures and amounts from before and after the violation. This stems, of course, from the fact that the delivered shipments of merchandise cannot be recovered intact.

We trust that this answers your questions.

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(C.S.D. 79-50)

Copyright: Application of "Manufacturing Clause" to "Scenes From Childhood," Printed in Hong Kong

Date: August 8, 1978  
File: CPR-5-R:E:R  
709314 0

With your letter of July 11, 1978, you enclosed three (3) spreads of full-color reproductions of paintings with commentary by (name) deceased author-artist, representative of the longest, shortest, and average commentary for the separate paintings to be included in the 32-page book, "Scenes From Childhood." The book is to be printed and bound in Hong Kong and is copyrighted in the United States in the name of the author-artist's daughter (name) a resident of the United States. In your opinion, the book would not be prohibited entry into the United States pursuant to section 601(a) of the Copyright Act, 17 U.S.C. 601(a), and you ask that we so advise you and the Customs office at New York.

In general, section 601(a) prohibits the importation and public distribution in the United States of a work authored by a U.S. national or domiciliary consisting preponderantly of nondramatic literary

material that is in the English language, unless the portions consisting of such material have been manufactured in the United States or Canada.

Where the work consists only partially of material protected by the manufacturing clause, the test is whether the work consists "preponderantly" of the protected material. The manufacturing requirement would apply if the English language nondramatic literary text exceeds the pictorial material in importance, although more pages of a book might be devoted to pictures than the text. However, in this case the painting reproductions exceed the text in importance. While the short commentaries enhance the work, the aesthetic quality of the book lies in the reproductions of the paintings. We are therefore of the opinion that the work in question, printed outside the United States and bearing the notice of copyright, would not be prohibited entry into the United States by the manufacturing clause of the Copyright Act.

Copies of your letter and our reply have been forwarded to the Chief, Duty Assessment Branch, New York Seaport, New York, N.Y.

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(C.S.D. 79-51)

Vessel Repair: Whether Certain Work Performed on Aircraft is dutiable; 19 U.S.C. 1466

Date: August 10, 1978  
File: VES-13-18-R:CD:C  
102424 JM

To: Regional Commissioner of Customs, San Francisco, Calif.

From: Director, Carriers, Drawback and Bonds Division.

Subject: Aircraft repair entry No. 108354, dated April 24, 1975, filed at Fairbanks, Alaska, covering repairs declared pursuant to title 19, United States Code, section 1466 to (aircraft).

By memorandum dated September 16, 1976, you requested that we review the titled entry which is the subject of a petition dated August 25, 1975, which was filed by (law firm), counsel for (aircraft owner). The petitioner has questioned dutiability of numerous items. We shall identify and discuss them in turn.

	<i>Invoice No.</i>	<i>Log No.</i>	<i>Item No.</i>	<i>Item</i>
1.	49967	8162	1.	Fixed labor charge for basic "C" check.
			2.	Cost of materials used in above job.

The applicant states that the above items were generated by scheduled certificate checks. We recognize that the aircraft was absent from the United States for a prolonged period of time. It was, therefore, difficult for the carrier to complete certification checks and repairs in this country. However, we have previously ruled, with respect to vessels, that neither a prolonged absence from the United States nor the fact that repairs were necessitated by certification requirements are grounds for relief. Petitioner has not alleged that the repairs are casualty related. Maintenance of airworthiness status is not, standing alone, grounds for remission. If it were, almost all work on aircraft could be performed foreign without the payment of duty, and the statute would be of no practical effect. Rather, duty will be remitted if work was performed to keep the aircraft airworthy, provided the foreign work was not reasonably foreseeable. Since the certification checks are required after the aircraft has operated for a specified number of hours, these items are reasonably foreseeable. Therefore, the above items are dutiable.

The speed-sensing control covered by log 8162 and Marshall of Cambridge invoice No. 51823 is also dutiable for the reasons stated in the preceding paragraph.

2.            52015            8259    1.            Tow bar used by AIA employees.

We have previously ruled, with respect to vessels in C.I.E. 1188/60, that tugs used in drydocking and undocking are not subject to duty. We believe use of this item is similar to a tug and is therefore not dutiable.

3.            52272            8291    1.            Turbo oil.

This item which is in the nature of fuel is not a repair and is therefore not dutiable.

4.            7965            8216    All            "C" check and repairs.

With the exceptions noted below, these items are dutiable for the reasons stated under No. 1 above.

Item 10 consists of transportation charges of 61-50 rand. This item is nondutiable as previously held in C.D. 1836 and C.I.E. 601/67. We believe the cost of telexes, item 9 in the amount of 12-45 rand, is not a repair and therefore nondutiable. Under item 7 concerning equipment, the transportation charges of 171-5 rand for transportation of the Hobart are nondutiable. We understand the Hobart is used to supply electricity. In Treasury Decisions 27154 and 49531, it was held that charges for drydocking, for furnishing air, water, and fees paid for the use of tugs and pilots in drydocking or undocking are not

dutiable repairs. Accordingly, the use of the Hobart to supply electricity is nondutiable.

5.           8031           8221 All           Repairs to engine and propeller.

The petitioner makes no claims that these repairs were caused by casualty. For the reasons stated under No. 1 above, these repairs are dutiable with exceptions noted below.

In C.I.E. 941/60 with respect to a vessel, we held that charges for transportation and employment of a crane are not subject to duty. Therefore, item 2 in the amount of 396-00 rand is nondutiable. Item 3 covers parking fees 5-00 rand, landing fees 149-20 rand and late takeoff fees 4-00 rand which are in the nature of drydocking charges and thus nondutiable as stated above.

6.           8730           314 All           "C" check and repairs.

With the exceptions noted below, these items are dutiable for the reasons stated in No. 1 above.

Items 7 and 8, totaling 560-00 rand, relate to transportation and rental of a Hobart and are nondutiable. Item 9, in the amount of 264-37 rand for rental of a crane is nondutiable. Item 11 in the amount of 113-20 rand is nondutiable as transportation costs. Item 12 in the amount of 41-60 covers landing fees and is nondutiable as stated under 4, above.

In C.I.E. 429/61 we held that testing conducted for the purpose of ascertaining whether repairs to machinery or parts are required, or performed in order to ascertain if work is adequately completed, are also integral parts of the repairs and are dutiable. We believe the X-rays under item 13 are dutiable for this reason.

7.           8812           324 All           Miscellaneous repairs.

Petitioner makes no claim of casualty. Repairs dutiable for reasons stated under No. 1, with exception noted below.

Item V covering rental of crane is non-dutiable.

8.           8889           330 All           Engine exchange.

Since there is no claim of casualty, all items are dutiable except item IV covering crane rental and item V for transportation charges which are non-dutiable as stated above.

9.           9339           471-472 All           "C" check and repairs.

All items are dutiable for reasons stated under No. 1 above except items 7 (crane), 8 (Hobart rental), 9 and 10 (transportation), and 15 (landing fees), all previously discussed.

In addition, item 16 covers insurance and would be nondutiable as similar to drydocking fees if the insurance covers the aircraft. However,

premiums paid on workmen's compensation insurance for workmen are dutiable repairs under TD 55005(3). A check should be made to determine the nature of the insurance.

10. 9409 3801 All "B" check and repairs.

All items are dutiable for reasons stated under No. 1 except items 4 (crane), 6 (landing fees), and possibly 7 (insurance), all previously discussed.

11. 9522 3822 All Engine and propeller repairs.

Since there is no claim of casualty, all items are dutiable except items 4, covering building of propeller box for transportation, 5 (crane), 6 (transportation), 9 (landing fees), and possibly 10 (insurance).

12. 9538 3849 All Engine and propeller repairs.

Since there is no claim of casualty, all items are dutiable except items 3 (crane), 5 (landing fees), 9 (transportation), and possibly 8 (insurance).

13. 9648 012 All "C" check and repairs.

With following exceptions, dutiable as stated in No. 1 above. Items VI (Hobart, VII and VIII (transportation), IX (landing fees), and possibly XII (insurance) are nondutiable as stated above.

14. 55464 026 All Miscellaneous repairs.  
56058  
50066

Since there is no claim of casualty, all items are dutiable except items 3 (landing charges), 4 (insurance of aircraft), 5 and 9 (transportation), 6 (telephone, telex and canteen charges), and 7 (fuel).

15. 55546 042 All Engine repairs, tire replacement.  
56013

Since there is no claim of casualty, items 1 and 2 on invoice 55546 are dutiable, with remaining items nondutiable for reasons previously stated. The aircraft tires on invoice 56013 may have been replaced as result of normal wear and tear and are considered dutiable.

16. 56848 2827 All Propeller repairs.  
56847

Since there is no claim of casualty, all items are dutiable except items 3 (transportation) and 4 (telex and telephone) on invoice 56847 and item 4 (telephone and telex) on invoice 56848. Transportation charges are not separately stated on invoice 56848 and are therefore dutiable as part of the repairs as stated in C.I.E. (1325/68. If peti-

tioner submits evidence that damage to propeller was casualty related, all items would be nondutiable.

- |     |       |      |     |                        |
|-----|-------|------|-----|------------------------|
| 17. | 10036 | 3213 | All | "C" check and repairs. |
|     |       | 3214 |     |                        |
|     |       | 3215 |     |                        |

All items dutiable as stated in No. 1 above except items VII (Hobart) VIII and XIII (transportation), XII (landing fees), and possibly XIV (insurance).

We are unable to comment on the item listed as "Signwriting as requested" in the absence of a clarification of this operation. In C.D. 1430, the Customs Court held the cost of lettering the words "Christmas Ship Pacific Northwest U.S.A." upon the sides of a ship to be neither an ornamentation, a restoration, nor a repair and, therefore, excluded from provisions of 19 U.S.C. 1466. Further information is necessary before this item can be considered nondutiable.

- |     |       |      |     |                        |
|-----|-------|------|-----|------------------------|
| 18. | 10427 | 3028 | All | Miscellaneous repairs. |
|-----|-------|------|-----|------------------------|

Since there is no claim of casualty, all items are dutiable except items 2 (Hobart power unit) and 3 (transportation).

- |     |       |      |     |                        |
|-----|-------|------|-----|------------------------|
| 19. | 10460 | 3037 | All | "C" check and repairs. |
|-----|-------|------|-----|------------------------|

All items dutiable as stated in No. 1 above except items 2 (crane), 3 and 10 (transportation), and 4 (Hobart power unit).

Under item 6, the shipping and packing of the propeller evidenced by work order numbered 2647 is nondutiable. The inspection evidenced by work order numbered 2646 is dutiable if for purposes outlined in No. 6 above. We ruled in C.I.E. 429/61 that the costs of inspections of machinery and parts which are in the nature of surveys are not dutiable. Item 7 covering X-ray inspection of wing dry bay will be governed by the same criteria.

- |     |       |       |     |                        |
|-----|-------|-------|-----|------------------------|
| 20. | 10461 | 3050- | All | Miscellaneous repairs. |
|     | 56485 | 2851  | All |                        |
|     | 56486 |       |     |                        |

The petitioner states that these repairs were occasioned by casualty or stress of weather and that evidence will be furnished. If such evidence is not furnished, certain items will be nondutiable under previous instructions in this letter.

- |     |       |      |     |                 |
|-----|-------|------|-----|-----------------|
| 21. | 50105 | 3901 | All | Engine repairs. |
|-----|-------|------|-----|-----------------|

Since there is no claim of casualty, all repairs are dutiable except items 3 (landing and airfield charges), 4 (insurance of aircraft), and 5 (telex and telephone).

- |     |       |      |     |                        |
|-----|-------|------|-----|------------------------|
| 22. | 51143 | 2934 | All | "C" check and repairs. |
|     | 51144 |      |     |                        |
|     | 51145 |      |     |                        |

All items dutiable as stated in No. 1 above except as follows:

- a. Item 7 on invoice 51143 covers a weighing charge which does not constitute a repair and is therefore nondutiable.
- b. With regard to invoice 51144, petitioner states that these were caused by a turbine explosion and further evidence will be presented. If evidence not presented, certain items will be nondutiable under previous instructions in this letter.

If you have further questions concerning this entry, please advise us. We are returning your file.

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(C.S.D. 79-52)

Drawback: Sugar; Determination of Market Values for Products Refined From Imported Sugar; Whether Toll Processed Sugar is to be Included in Calculation of Drawback

Date: August 10, 1978  
File: DRA-1-R:CD:D S  
209023

Re drawback on imported sugar; your letter of May 4, 1978.

You asked us to resolve two legal issues concerning your company's drawback claim on exported sugar products. The first is the determination of market values for products refined from imported raw sugar, and the second is whether or not toll processed sugar should be included in the calculation of the drawback.

Your company claims drawback under a general drawback authorization issued pursuant to section 313(b) of the Tariff Act of 1930, as amended (19 U.S.C. 1313(b)) and section 22.6(f) of the Customs Regulations. The claim covers production during a 3-month period.

Section 22.6(f)(15) requires the refiner to file with each abstract a statement "showing the average market values" of the products manufactured during the abstract period. Section 22.6(f)(16) provides that "at the end of each calendar month the refiner shall furnish to [Customs] \* \* \* a statement showing the actual sales of sirup and the average market values of refined sugars for the calendar month."

In 1934 your company described as follows its method of calculating the market value of its sugar production:

This company has at all times a list price for Fine Granulated packed in 100 pound bags, at which its sugar is sold. Grades and packings other than Fine Granulated in 100 pound bags are sold either at this list or basis price, or at fixed differentials above or below same.

The value of all hard sugar, reported in connection with an abstract, is the basis price, referred to above, averaged



for all the days falling within the abstract period, exclusive of Sundays and holidays, without regard to the quantities of sugar sold or delivered on the several days, but with the customary 2 percent cash discount deducted. The value includes the value of 100 pound bags which is the lowest cost package used in the trade but the value of any package in excess of the value of 100 pound package is excluded.

The value of each grade of soft sugar is established by applying to the basis price, above referred to, the fixed differential for the grade of soft sugar in question and deducting the 2 percent cash discount.

The value of blackstrap reported in connection with abstracts is the weighted average price received for domestic deliveries of blackstrap in bulk during the abstract period. If there are no deliveries made during a period, the value used in the preceding period is used.

The average values of refined sugars for the calendar month, required in connection with abstracts, are also derived as above described in connection with hard and soft sugars.

Given the large volume of sales and the absence of computer technology at the time the procedure described above was adopted, there was no more acceptable method of determining market value. The 1934 solution provides an accurate average market price for the period on the basis of the number of days specific prices are in effect. However, the volume of sales at each day's price cannot be taken into account.

The company now uses computers to tabulate its sales. Therefore, it is possible to determine the average market value of each product during the abstract period on the basis of actual sales rather than daily market prices. The new method is more consistent with section 22.6(f)(16) of the regulations.

We note that the company states it will abandon the method of determining market value for refined sugar products which the Customs Service approved in 1934. Average market values are to be determined from actual sales prices contained in company records. In view of current technology capabilities, we welcome this change.

The second issue is whether the company should include in its abstracts of production and other documents filed with the drawback claim sugar that has been toll processed for other firms.

During the abstract period, the company refined sugar coating for another company under a service contract with the owners of the raw sugar. Although all raw sugar of a given type is commingled in storage and in process, the refiner shipped to the owner of the toll processed sugar a quantity of the desired product equivalent to the production yield of the raw sugar owned by the other company.

Section 22.6(f)(5) of the Customs Regulations provides:

For the purpose of distributing the drawback in accordance



with the provisions of section 313, Tariff Act of 1930, relative values shall be established between hard refined (granulated) sugar, soft refined (various grades) sugar, and sirups at the time of separation. The entire period covered by an abstract shall be deemed the time of separation of the sugars and sirups covered by such abstract.

To comply with this provision, the refiner must relate the total value of each product refined during the period of the abstract to the total value of all such products. Relative values are used to distribute the total drawback among the products, only some of which may be exported. It is immaterial who owns the products.

Treasury Decisions 55027(2) and 55207(1) enable the owner of toll processed raw material to comply with the requirement in 19 U.S.C. 1313(b) that the same manufacturer use both the designated and non-designated merchandise. These treasury decisions make the owner the user for drawback purposes, even though the actual user's records of manufacture and delivery substantiate the owner's drawback allowance.

The company which has its raw sugar toll processed is entitled to drawback on its exports in the same manner that the refiner is entitled to drawback on exported products manufactured for its own account. Neither company can collect drawback, however, unless the refiner determines the relative value of this and all other products manufactured during the abstract period. The toll processor must supply all necessary production data and drawback records to the owner of the toll processed products when the latter claims drawback.

Accordingly, the company has not violated section 22.6(f) of the Customs Regulations. The toll processed sugar must be included in the liquidation of abstracts, referred to in section 22.17(f)(17) of the Regulations to reflect the relative value of this product. The relative value is expressed in terms of sucrose allowance per unit. Although it will use the new method of calculating market value in all pending and future claims, the company had ample authority to use the old method.

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(C.S.D. 79-53)

**Warehouses: Transfer of Zinc From Class 7 Bonded Warehouse to Nonbonded facility**

Date: August 10, 1978  
File: WAR-5-02-R:CD:D S  
209140

**Re withdrawal of zinc from class 7 bonded warehouse; your letter of June 12, 1978.**

You asked whether imported electrolytic zinc which is entered into a bonded smelting and refining warehouse (class 7) can be transferred before processing to unbonded smelting and refining facilities without causing a breach of the warehouse entry bond.

During one 3-month period, your client entered into one of its class 7 facilities 47 million pounds of imported electrolytic zinc. Approximately 45 million pounds were processed at this facility. For economic reasons, the balance of the entry was shipped prior to processing to six other smelting and refining facilities owned by the company, three class 7 and three unbounded. A small amount was sold unprocessed to another company.

Your client contends that the principle of fungibility permits the transfers described above. The company maintains a pound of imported or domestic zinc in its class 7 bonded warehouses for each pound of dutiable zinc in its inventory. As long as the substitute is accounted for in the same manner as the imported material, you believe that we should permit the company to transfer the imported material outside the bonded premises.

Section 312(a) of the Tariff Act of 1930 (19 U.S.C. 1312(a)) provides that "Metal-bearing materials may be entered into a bonded smelting or refining warehouse without the payment of duties thereon and there smelted or refined, or both, together with metal-bearing materials of domestic or foreign origin." Section 312(b)(2) permits cancellation of bond charges "upon payment of duties on the dutiable quantity of metal contained in the imported metal bearing materials."

Section 312(a) clearly authorizes the commingling of domestic and imported ores in the class 7 warehouse for smelting and refining purposes. Section 312(b) shows that accounting for bond charges is to be done on the basis of numerical quantities of dutiable material, not specific identification of imported merchandise at each stage of production.

The principle of fungibility, however, does not mean that unsmelted or unrefined imported ores can be transferred to nonbonded facilities. Referring to the bonded facility, section 312(a) states that the imported ore shall be "*there smelted or refined.*" (italic added). Moreover, the U.S. Tariff Commission's "Tariff Classification Study" (Nov. 1963, p. 81) states, concerning section 312(b)(2), "It, of course, is not contemplated by either the proposed revision or by recent change in practice that physical withdrawals be made of untreated materials. The imported material must be smelted or refined, or both, except in unusual or emergency circumstances." Withdrawal in the latter circumstances is not relevant in this case.

The list of circumstances in which the warehouse entry bond may be canceled is stated in section 312(b) of the statute. Transfer of

unprocessed ores to nonbonded facilities is not one of those circumstances. Failure to comply with applicable law and regulations causes a breach of the warehouse entry bond.

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(C.S.D. 79-54)

**Duty-Free Entry: Pharmaceuticals of U.S. Origin Packaged in Mexico and Returned**

Date: August 10, 1978  
File: CLA-2:R:CV:MSP  
058484 FC

In your letter of August 1, 1978, you state that you are manufacturing pharmaceuticals, tablets, capsules, and liquids, in California. However, the main market for these items is located east of the Mississippi. You are desirous of establishing a packaging plant along the Mexican border to package these items intransit to market.

You state that no changes would be made in the products. They simply would be shipped in bulk to the Mexican packaging plant, repackaged for the retail or prescription market, and shipped back across the border to their destination. You do not describe the packaging involved.

As you may know, item 800.00, Tariff Schedules of the United States (TSUS), copy enclosed, provides for the free entry of products of the United States that are returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad, upon compliance with the applicable Customs Regulations, copy enclosed.

If the involved pharmaceutical products have not been the object of an advance in value or improvement in condition while abroad, but merely are packaged, they could qualify for entry free of duty under the provisions of item 800.00, TSUS, upon compliance with the Customs Regulations.

Further, assuming the packaging material is of U.S. origin, in view of General Headnote 6(b)(i), TSUS, copy enclosed, pertaining to certain containers and holders not imported empty, which are returned without having been advanced in value or improved in condition by any means while abroad, there is no assessment of duty on the cost of nonreuseable packaging materials holding the domestic merchandise, or on the cost of getting duty-free merchandise under item 800.00, TSUS, into the condition in which it is imported.

It is suggested that before any merchandise is exported from the United States to Mexico you, or your customhouse broker, communi-

cate with Customs officers at the port where the merchandise will be exported from or entered into, for further guidance on procedures which must be followed and to insure understanding of and compliance with all required regulations.

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(C.S.D. 79-55)

Vessel Repair: Dutiability of Repairs to Ocean Cargo Containers

Date: August 11, 1978

File: VES-13-R:CD:C

103417 JL

This is in reference to your letter of April 25, 1978, concerning the publication by the Customs Service on April 4, 1978, of a notice of proposed amendments to sections 4.7(d)(1) and 4.14 of the Customs Regulations to modify procedural requirements relating to entries for foreign repairs and equipment purchases by American-flag vessels.

You ask whether expenses of repairs, repair parts, and materials purchased for repair of ocean cargo containers incurred in foreign countries are dutiable. You state that your question is based on your observation that "the container is part and parcel and an integral part of a container ship \* \* \*."

It is our opinion that reusable shipping containers of the type described in article 1 of the Customs Convention on Containers, when utilized as instruments of international traffic are not vessel equipment. In such instances, the container ship is utilized merely as the means of transport for the container. See footnote 38a, section 10.41a (a)(3), Customs Regulations. Under the circumstances, the cost of repairs to such containers would not be dutiable under the vessel repair statute, section 466, Tariff Act of 1930 (19 U.S.C. 1466).

You should be advised, however, that containers of the type here under discussion, when not being utilized as instruments of international traffic, could be considered equipment of a vessel. As an example, if a container were attached to the deck of a vessel and utilized to store ship's supplies rather than cargo, it would be an item of vessel equipment and subject to the duties imposed by 19 U.S.C. 1466.

Repairs, or parts utilized in effecting repairs, would not be dutiable if the containers were "instruments of international traffic" because section 10.41a(h), Customs Regulations, as amended by Treasury Decision 69-146, provides that when an instrument of international

traffic returns to the United States and is released in accordance with the provisions of section 10.41a(a), foreign repairs are not subject to entry or to the payment of duty.

The duties referred to in section 10.41a(h), however, would have accrued under the Tariff Schedules of the United States (19 U.S.C. 1202), rather than under 19 U.S.C. 1466. Further, duties accruing under 19 U.S.C. 1446 (vessel equipment landed and delivered considered and treated as imported merchandise) could be assessed independently of, and in addition to, vessel repair duties on a container if the facts so warranted.

In summary, then, it is our opinion that repairs to containers which are "equipments", as that term is used in 19 U.S.C. 1466, would be dutiable, while repairs to containers which are utilized as "instruments of international traffic" under section 10.41a, et seq., of the Customs Regulations, would not be dutiable.

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(C.S.D. 79-56)

Foreign Trade Zones: Reassembly of Truck in Zone Following Disassembly in Zone and Constructive Transfer to Customs Territory

Date: August 11, 1978

File: FOR-2-R:CD:D

209280 S

To: Regional Commissioner of Customs, San Francisco, Calif., Attn: Acting Director, Inspection and Control Division.

From: Director, Carriers, Drawback and Bonds Division.

Subject: Disassembly of truck in foreign trade zone.

You asked whether trucks which have been disassembled in a foreign trade zone and constructively transferred to customs territory may be reassembled in the zone under the following circumstances.

Imported trucks having the zone status of nonprivileged foreign merchandise are dismantled to separate truck beds and chassis. The parts are transferred constructively to customs territory, in accordance with section 146.47 of the Customs Regulations. The entry documents are filed pursuant to section 146.47(c).

At this point in the transaction, the owner of the vehicles wishes to restore the disassembled parts to zone status for the purpose of re-assembling the parts before removing them to the customs territory. The issue is whether the "restored" zone status may be privileged domestic rather than nonprivileged foreign. If privileged domestic,

there would be no additional duty liability for the merchandise after reassembly in the zone.

Section 146.47(d) provides that merchandise constructively transferred to customs territory may be "restored to zone status \* \* \* before the expiration of the time within which entry or withdrawal must be made \* \* \*". This is accomplished by redelivery to the district director of the approved constructive transfer documents and the filing of a new application for admission of merchandise into the zone.

"Restore" is defined in Webster's New Collegiate Dictionary (1961 ed.) as follows: "To bring back to, or put back into, an original state \* \* \*." This common meaning applies to the use of the word in section 146.47(d). Merchandise that is "restored" to zone status must receive the same zone status it had prior to constructive transfer. The intent of this regulation clearly is to reestablish the status quo ante rather than bestow additional benefits or advantages on foreign trade zone users.

You asked whether the parts may alternatively be reassembled pursuant to section 146.13 of the regulations after they have been constructively transferred and formally entered but before they have been removed from the zone and customs custody. That section provides for the temporary admission into the zone for manipulation of merchandise that has been entered into customs territory but not released from customs custody.

Section 146.13 authorizes manipulation of merchandise, not manufacture. When a new and different product having a different name, character, and use results from a commercial operation, the operation is considered a manufacture for customs purposes. Disassembly is a manipulation because the resulting parts have no different name, character, and use than they had in their assembled condition. It is the opposite of manufacture. On the other hand, assembly or reassembly is a process in the manufacture or production of a vehicle, as fabrication is a process in the manufacture of a part. The vehicle has a different name, character, and use than the parts of which it is composed.

Accordingly, the truck chassis and bodies cannot be reassembled in the foreign trade zone under section 146.13 of the regulations. They may be restored to zone status under section 146.47(d) and thereafter reassembled in the zone, but the reassembled vehicles would be classified and appraised as nonprivileged foreign merchandise if that was their zone status prior to their first constructive transfer. Of course, this procedure would offer no practical advantages.

(C.S.D. 79-57)

Vessel Repair: Repairs Made During Maiden Voyage of "Special Purpose Vessel"

Date: August 14, 1978

File: VES-13-18-R:CD:C

103364 JL

To: Regional Commissioner of Customs, New Orleans, La. 70112.

From: Director, Carriers, Drawback and Bonds Division.

Subject: Vessel repair entry No. 213867, dated December 2, 1975,  
M/V *Phyllis A. Guidry*; your memo, March 22, 1978, VES-13-  
18-V:O:CV:L ML.

You forwarded for our review a petition for remission of vessel repair duties under 19 U.S.C. 1466 (b) and (c) concerning the above-referenced vessel which departed the United States on March 13, 1973, returning approximately 2 years, and 9 months later on December 2, 1975.

Petitioner maintains that the vessel at issue was designed and used primarily for purposes other than transporting passengers or property in the foreign or coasting trade, and therefore qualifies as a "special purpose vessel" pursuant to 19 U.S.C. 1466(c). We have reviewed petitioner's exhibit No. V, and it is our opinion that the *Phyllis A. Guidry* is a special purpose vessel qualifying under the statute in line with our earlier rulings incorporated into the Customs Issuance System (CIS) as legal determinations 3730-06 and 10. Therefore, only those repairs accomplished during the first 6 months of the vessel's voyage would be dutiable.

You note that for certain repairs accomplished during the first 6 months of the vessel's voyage, petitioners seek remission under 19 U.S.C. 1466(b) claiming that repairs were made to new equipment which was under warranty. You continue that the petitioner has not furnished copies of warranties and has not given any evidence of damage by heavy weather or other extrinsic force amounting to a casualty. It is your opinion that remission may be granted due to the fact that the vessel was new and on its maiden voyage, citing T.D. 71-83(38) which you believe to be applicable.

T.D. 71-83(38) held that if satisfactory evidence is furnished clearly showing any part of a vessel to have been repaired and/or serviced just prior to the commencement of a voyage from a U.S. port, it is reasonable to assume that the part is seaworthy for a round voyage, foreign and return, and failure of that part to function within



6 months after the repair in the United States may be considered a casualty within the meaning of 19 U.S.C. 258(1), now 19 U.S.C. 1466(b)(1).

Petitioner has offered no evidence that the equipment at issue was repaired and/or serviced prior to the commencement of the vessel's voyage from a U.S. port. For that reason T.D. 71-83(38) is not applicable in this case.

On the other hand, ORR Ruling 23-69, dated February 18, 1969, holds in part:

In the case of a new vessel on its first voyage, it is reasonable to assume that new equipment covered by a warranty is seaworthy for around voyage, foreign and return. Unless the evidence indicates some other cause, failure of such equipment may be considered a "casualty" within the meaning of section 258(1). However, remission of duty under that statute in these circumstances is limited to duty on the essential, minimum foreign repairs to the equipment. Furthermore, remission is limited to those specific items which the evidence shows were covered by the warranty and then malfunctioned.

Is the petitioner able to supply evidence that warranties were in effect when the repairs were accomplished?

We are not persuaded that the invoices set out in the petitioner's exhibit I(A) are entirely adequate to support the contention that all of the amounts expended during the first 6 months of the vessel's voyage were in fact for "repairs." We particularly note that certain invoices appear to be for spare parts. As an example, sales invoice no. A-3835 from the Stork-Werkspoor Diesel has as its subject, sales "spares type 9 FBHD 240." Also, an invoice dated August 31, 1973, from Motorenwerk Bremerhaven, No. 08-201a, involving \$2,824.58 in materials, has appended to it a hand written note to the effect that the materials were purchased to replace others that were damaged. While we might not object to the allowance of remission on equipment purchased to replace spares in the ship's complement that were utilized to effect repairs, we are of the opinion that you should obtain some statement from the petitioner to explain whether repairs were effected with the use of the spares. Clearly, the purchase of spare parts is dutiable and since spare parts are not deemed necessary to enable the vessel to reach its port of destination, there can be no remission of the duty on such purchases as a matter of routine.

Also, we note that the petition contains an invoice from Stork-Werkspoor Diesel for \$1,981.37 in engine parts which the petitioner has notated as "main engine repairs." We merely note this as an illustration because the invoice is dated December 31, 1973, which is



beyond the 6-month period during which repairs and equipment purchases would be dutiable under 19 U.S.C. 1466(c)).

Your file is attached herewith.

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(C.S.D. 79-58)

Vessels: Whether Students on a "Floating College" are Passengers

Date: August 14, 1978  
File: VES-3-02-R:CD:C  
103529 PC  
Your File: VES-4

To: Regional Counsel, San Francisco, Calif.

From: Director, Carriers, Drawback and Bonds Division.

Subject: Memorandum dated June 26, 1978, requesting internal advice.

This refers to your memorandum of June 26, 1978, with enclosures, requesting internal advice concerning the (group) a nonprofit educational corporation, which you state utilizes the foreign-built sailing sloop *Paragon* for transporting persons between points embraced within the coastwise laws in and around Hawaii in conjunction with an educational program in subjects such as marine biology, oceanography, seamanship, navigation, geology, volcanology, Hawaiiana, ethnobotany, and meteorology.

You inquire whether the vessel would be considered to be used in the coastwise trade, an employment prohibited to foreign-built vessels. An issue is whether the participants in the various training course would be considered passengers. If so, the vessel then would be engaged in the coastwise trade.

The coastwise trade is generally defined as the transportation of passengers or merchandise between points embraced within the coastwise laws, including the carriage of passengers entirely within the territorial waters, even though the passengers are disembarked at their point of original embarkation and touch at no other coastwise points. Passengers in this context are defined as "any person carried on a vessel who is not connected with the operation of such vessel, her navigation, ownership, or business" (sec. 4.50(b), Customs Regulations). Under such definition the Customs Service has held that persons carried on board a vessel for educational courses or training, which courses or training do not reasonably require the participants' presence on board as part of such training are passengers, subjecting

the vessel to the prohibitions of title 46, United States Code, section 289. However, the Customs Service has also held that persons being trained in the handling or use of a vessel whose presence on board is reasonably required as part of such training are not "passengers" within the meaning of the above definition and if the vessel is solely used for such training, the vessel would not be engaged in the coastwise trade within the meaning of title 46, United States Code, section 289.

Applying the above rulings to the present circumstances, it is our opinion that if the participants are being solely trained in such subjects as marine biology, sail-handling, oceanography, seamanship, or navigation, which training requires their presence on board as part of such training, the participants may not be considered as passengers and the vessel would not be considered engaged in the coastwise trade. If the participants are also being trained in subjects such as geology, volcanology, Hawaiiana, ethnobotany, meteorology, or other training which does not require their presence on board the vessel, the participants would be considered passengers and if transported coastwise a violation of title 46, United States Code, section 289, would be incurred.

Since the students would be considered passengers in any event, the U.S. Coast Guard should be contacted regarding applicable safety requirements.

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(C.S.D. 79-59)

Classification: Zoris

Date: August 18, 1978  
File: CLA-2:R:CV:MA  
056203 c

Your letter of February 2, 1978, written on behalf of the (client) group, notes that a change in the classification of certain footwear presently classifiable under item 700.54, Tariff Schedules of the United States (TSUS), zoris, is presently under consideration by the Customs Service. This contemplated change would make such merchandise classifiable under item 700.58, TSUS, if its soles are over 1 inch in thickness.

In order to clarify the situation with respect to footwear which is classifiable under item 700.54, TSUS, it is our view that the following criteria determine what constitutes a zori for tariff purposes:

1. Sandal-type footwear which is over 50 percent by weight of rubber or plastics, and which has an upper the exterior surface of which is over 90 percent rubber or plastics.

2. A single-piece molded upper, either a thong which is V or Y shaped and passes in front between the wearer's first and second toes, or else an upper which is X shaped and passes over the wearer's instep.
3. The one-piece upper must be distinct from the sole.
4. The upper straps must penetrate the sole and pass into or through it, and must be self-secured, such as by means of strap end plugs, to prevent them from pulling through.
5. No lining on the inner surface of the upper, and no lining, such as a sock lining, on the sole.
6. The footwear may feature ornamentation, such as a plastic flower.
7. The footwear must have a flat sole or bottom of uniform thickness. Minor variations in thickness will be disregarded.

Three sample sandals were submitted as examples of zoris. The sole thickness of style No. 215 is approximately  $1\frac{1}{4}$  inches, which diminishes to approximately fifteen-sixteenth of an inch at the front or toe portion of the sandal. The sole thickness of the yellow sandal is approximately 1 inch throughout the entire sole. The green "jellyroll" type sandal has a sole which measures thirteen-sixteenths of an inch in thickness up to approximately the midpoint, where the thickness increases to  $1\frac{1}{4}$  inches.

It is our opinion that the first two samples are within the above criteria, and are classifiable as zoris under item 700.54, TSUS. The jellyroll type sandal does not have a sole of uniform thickness, and thus is not classifiable under the provision for zoris.

This ruling should not be interpreted as implying that sandals with soles substantially thicker than the samples submitted will automatically qualify for classification under item 700.54, TSUS, if the soles are of uniform thickness. We will apply this ruling to other sample sandals on a case-by-case basis, depending upon the characteristics of the samples submitted.

This decision is being circulated to all Customs offices in order that the merchandise may be uniformly classified at each port where it may be entered.

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(C.S.D. 79-60)

Classification: Beach Sandal having a One-Piece F-Shaped Upper

Date: August 21, 1978

File: CLA-2:R:CV:MA

0056716 C

In a letter dated May 22, 1978, you inquired as to the dutiable status of an F strap sandal manufactured in Taiwan. A sample was submitted for examination.

The sample is a beach sandal having a one-piece F shaped upper which is not stitched or lined. The upper is attached to the rubber sole by means of plugs which go completely through the sole. The sole measures approximately one-half inch in thickness.

In order to be considered a zori classifiable under item 700.54, Tariff Schedules of the United States (TSUS), the upper must have a V, X, or Y configuration. Inasmuch as the upper of the sample beach sandal does not have such a configuration it is not classifiable as a zori under item 700.54, TSUS.

It is our view that this beach sandal is classifiable under the provision for other footwear which is over 50 percent by weight of rubber or plastics and having uppers of which over 90 percent of the exterior surface area is rubber or plastics in item 700.58, TSUS, and dutiable at the rate of 6 percent ad valorem.

## *General Notices*

### **Importation of Tuna and Tuna Products from Costa Rica Prohibited**

**AGENCY:** U.S. Customs Service, Department of the Treasury.

**ACTION:** General notice.

**SUMMARY:** This notice is to advise that under the Fishery Conservation and Management Act of 1976 ("the Act"), the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs has certified to the Secretary of the Treasury that two U.S. fishing vessels, while fishing in waters beyond any foreign nation's territorial sea, to the extent that such sea is recognized by the United States, were seized by Costa Rica as a consequence of a claim of jurisdiction which is not recognized by the United States. Pursuant to section 205(b) of the act, the Secretary of the Treasury has determined that the entry for consumption or withdrawal from warehouse for consumption of tuna and tuna products from Costa Rica is prohibited until the Department of State notifies the Secretary of the Treasury that the reasons for this prohibition no longer prevail.

**EFFECTIVE DATE:** This prohibition is effective as to tuna and tuna products from Costa Rica imported on or after Feb. 16, 1979. Such importations shall not be entered for consumption or withdrawn from warehouse for consumption on or after that date.

**FOR FURTHER INFORMATION CONTACT:** Harrison C. Feese, Entry, Examination, and Liquidation Branch, Duty Assessment Division, Office of Operations, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; 202-566-8651.

### **SUPPLEMENTARY INFORMATION:**

#### **BACKGROUND**

Section 205(a)(4)(C) of the Fishery Conservation and Management Act of 1976 (16 U.S.C. 1801 et seq.), provides that the Secretary of State shall certify to the Secretary of the Treasury any determination that a fishing vessel of the United States, while fishing in waters beyond any foreign nation's territorial sea, to the extent that such sea is recognized by the United States, has been seized by a foreign nation as a consequence of a claim of jurisdiction not recognized by

the United States. The responsibility for this certification was delegated to the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs by Department of State Delegation of Authority No. 138 of April 29, 1977.

Pursuant to section 205(b) of the act, upon receiving the certification, the Secretary of the Treasury is required to take such action as may be necessary and appropriate to prohibit the importation of all fish and fish products from the fishery involved.

Section 205(c) of the act provides that if the Secretary of State finds that the reasons for the import prohibition under section 205 no longer prevail, the Secretary of State shall notify the Secretary of the Treasury, who shall promptly remove the import prohibition.

On January 18, 1979, the *Uncle Louie* and the *Seafox*, fishing vessels of the United States, were seized by authorities of the Government of Costa Rica approximately 170 miles off the shore of Costa Rica for fishing tuna without Costa Rican authorization. Costa Rica claims jurisdiction over tuna within 200 miles of its coast. The United States does not recognize this jurisdiction.

Pursuant to section 205(a) of the act, on February 6, 1979, the Assistant Secretary of State certified the seizure of the *Uncle Louie* and the *Seafox*, while fishing in waters beyond the jurisdiction of Costa Rica.

#### DETERMINATION

Under the authority of sections 205 (b) and (c) of the Fishery Conservation and Management Act of 1976, on February 9, 1979, the Secretary of the Treasury determined that the entry for consumption or withdrawal from warehouse for consumption of tuna and tuna products for Costa Rica (the "county of origin") is prohibited until the Department of State notifies the Secretary of the Treasury that the reasons for this prohibition no longer prevail.

#### DRAFTING INFORMATION

The principal author of this document was Laurie Strassberg Amster, Regulations and Legal Publications Division, U.S. Customs Service. However, personnel from other offices of the Customs Service and the Treasury Department participated in its development.

Dated: February 13, 1979.

RICHARD J. DAVIS,  
*Assistant Secretary of the Treasury.*

[Published in the Federal Register Feb. 16, 1979 (44 FR 10171)]

## Recent Unpublished Customs Service Decisions

The following listing of recent administrative decisions issued by the Office of Regulations and Rulings, U.S. Customs Service, and not otherwise published, is published for the information of Customs officers and the importing community. Although the decisions are not of sufficient general interest to warrant publication as Treasury Decisions, the listing describes the issues involved and is intended to aid Customs officers and concerned members of the public in identifying matters of interest which recently have been considered by the Office of Regulations and Rulings.

A copy of any decision included in this listing, identified by its date and file number, may be obtained in a form appropriate for public distribution upon written request to the Office of Regulations and Rulings, Attention: Legal Reference Area, room 2404, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229. These copies will be made available at a cost to the requester of 10 cents per page. However, the Customs Service will waive this charge if the total number of pages copied is 10 or less.

Decisions listed in earlier issues of the CUSTOMS BULLETIN, through January 3, 1979, are available in microfiche format at a cost of \$5.10 (15 cents per sheet of fiche). It is anticipated that additions to the microfiche will be made quarterly and subscriptions are available. Requests for the microfiche now available and for subscriptions should be directed to the Legal Reference Area. Subscribers will automatically receive updates as they are issued and will be billed accordingly.

Dated: February 12, 1979.

LEONARD LEHMAN,  
*Assistant Commissioner, Regulations and Rulings.*

Date of decision	File No.	Issue
11- 8-78	049772	Classification: Fringed edgings (347.33, 347.60, 353.50, 357.70)
11- 8-78	049776	Classification: Industrial close weave fabric of man-made fibers (338.30)
10-26-78	054822	Classification: Handbags of textile materials (706.24)
11-22-78	055200	Classification: Soapstock, a vegetable tallow byproduct (184.75, 465.30)
12-22-78	055235	Classification: Oven mitts or potholders (366.79, 386.50)
12-20-78	055277	Classification: Undershirts having substantial use as outerwear (378.15, 380.06)
12-20-78	055278	Classification: Pullover with zig-zag stitching on collar and capping (382.04, 382.78)



Date of decision	File No.	Issue
12-20-78	055343	Classification: Raincoat with scarf-like extensions on hood (382.00)
11-14-78	059016/ 059495	Classification: Boron-10 isotope (494.52)
10- 4-78	059221	Classification: Scarves (372.30, 372.35, 372.70)
11-15-78	059353	Classification: Scarves, shawls, mufflers (365.78, 372.10, 372.70, 382.02, 702.54, 702.56, 702.90, 703.10)
11-15-78	059371	Classification: Synthetic chamois cleaning cloth (774.60)
10-27-78	059475	Classification: Wooden, woven salad bowl (206.95, 206.98)
12-20-78	059517	Classification: Post-mastectomy brassiere (376.24, 376.28)
12-19-78	059525	Classification: Hand-warmer muff (382.33, 382.81, 748.40)
11-14-78	059534	Classification: Support stockings (374.60, 709.57)
11-15-78	059577	Classification: Fabric coated or filled with plastic (346.60, 355.82, 359.50)
11-17-78	059752	Classification: Steroid drug precursors (425.52, 425.99, 427.64, 428.12, 437.60, 439.30)
10- 4-78	059772	Classification: Jeans with labels plain or stylized
11- 3-78	059781	Classification: Maxarome paste, an autolyzed yeast extract (437.49)
11-17-78	059826	Classification: Toasted onion product (141.50)
11-17-78	059864	Classification: Pocket-sized address book (256.56)
11-14-78	059398	Classification: Instant wool; greasy wool (306.22, 306.32, 307.40)
11-29-78	059922	Classification: Rubber processing chemicals (403.60, 403.90, 425.36)
11-30-78	059947	Classification: Cooking wine or sauce (182.46)
11-17-78	059948	Classification: Ethyl silicate (428.72)
11-29-78	059972	Classification: Heat transfer printing paper (252.67)
11-17-78	059993	Classification: Handcrafted wooden screen (206.67)
12-20-78	060040	Classification: Waterproof ski jackets (376.56)

# Decisions of the United States Customs Court

United States Customs Court

One Federal Plaza  
New York, N.Y. 10007

*Chief Judge*

Edward D. Re

*Judges*

Paul P. Rao

Morgan Ford

Scovel Richardson

Frederick Landis

James L. Watson

Herbert N. Maletz

Bernard Newman

Nils A. Boe

*Senior Judge*

Samuel M. Rosenstein

*Clerk*

Joseph E. Lombardi

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## *Customs Decision*

(C.D. 4785)

ELSE SCHMELZER DBA STAUFEN STUDIO v. UNITED STATES

*Lack of jurisdiction*

Court No. 78-11-01955

Port of Cleveland

[Motion to dismiss granted.]

(Dated January 31, 1979)

*Elsie Schmelzer*, plaintiff *pro se*.

*Barbara Allen Babcock*, Assistant Attorney General (*Robert H. White*, trial attorney), for the defendant.

RICHARDSON, Judge: The defendant moves to dismiss this action on the ground that the court lacks jurisdiction of the subject matter.

The action contests denial of protests challenging the liquidation of six (6) entries of merchandise, described as, among other things, arts of wood or wooden wares, on July 15, 1977, under TSUS items 207.00 and 725.50 at the duty rate of 8 per centum ad valorem without allowing a claimed 15 percent wholesale discount.

The protests were denied on May 3, 1978. And on November 3, 1978, or 184 days after denial of the protests, a summons embracing the protests was filed with the court. The record discloses that plaintiff mailed the original and copies of the summons to the office of defendant's attorney on October 30, 1978, or 180 days after denial of the protests, that the summons was received by counsel on November 2, 1978, and forwarded by counsel to the clerk of this court on November 3, 1978, the date of the filing of the summons, and that a letter was sent to plaintiff by counsel on the same date advising plaintiff of the forwarding of the summons to the court.

The foregoing constitutes the factual basis underlying the instant motion in which defendant contends that under 28 U.S.C.A. 2631 an action contesting denial of a protest is required to be filed within 180 days of the denial of the protest, and that in this case the summons was filed with the clerk of this court on the 184th day following denial of the protests. Plaintiff responds by asserting that the summons was mailed on the 180th day following denial of the protests in accordance with rule 3.2(b) of the rules of this court.

Rule 3.2(b) which regulates the manner in which a summons is required to be filed in the Customs Court provides:

For purposes of commencement of an action a summons sent by registered or certified mail *properly addressed to the clerk of the court at One Federal Plaza, New York, New York 10007*, with the proper postage affixed and return receipt requested, shall be deemed filed as of the date of postmark [italic added].

Since the summons was not addressed to the clerk of the court as provided for in the rule, it cannot be said that the summons was filed in accordance with rule 3.2(b) so as to be deemed filed as of the date of the postmark, and the court so finds. And inasmuch as the summons was actually received and filed on November 3, 1978, which is 184 days after denial of the protests, the action was commenced too late, in consequence of which, the court lacks jurisdiction of the action.

The defendant's motion to dismiss for lack of jurisdiction is, therefore, granted.

(C.D. 4786)

## ZWICKER KNITTING MILLS v. UNITED STATES

## Gloves

## AMERICAN GOODS RETURNED

Knit glove shells and precut palms, products of the United States, were processed in Haiti into completed gloves and classified under item 704.85, TSUS, as unornamented knit gloves of man-made fibers and under item 704.65, TSUS, as modified, as wool gloves valued over \$4 per dozen pairs. Duty allowance under item 807.00, TSUS, as amended, was allowed by Customs as to the precut palms, but was denied as to the knit glove shells. Plaintiff challenges the refusal of Customs to make an allowance for the cost or value of the knit glove shells under item 807.00, as amended. *Held*, duty allowance under item 807.00, as amended, *disallowed* as to the knit glove shells for failing to qualify as articles "exported in condition ready for assembly without further fabrication" and as articles that "have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting."

## ITEM 807.00—FURTHER FABRICATION

The testimony and exhibits of record demonstrated that completing the fingertips of the knit glove shells by the "tipping" operation performed in Haiti constituted "further fabrication" within the meaning of clause (a) of item 807.00, as amended. The "tipping" operation completed the manufacturing process commenced in the United States on the knit glove shells. The knit glove shells required additional fabrication or manufacture, and therefore were not fabricated components "ready for assembly without further fabrication." See *Rudolph Miles v. United States*, 65 CCPA —, 567 F. 2d 979 (1978); *E. Dillingham, Inc. v. United States*, 60 CCPA 39, 470 F. 2d 629 (1972); *Baylis Brothers Co. v. United States*, 64 Cust. Ct. 256, C.D. 3987 (1970), *aff'd*, 59 CCPA 9, 451 F. 2d 643 (1971).

## ITEM 807.00—ASSEMBLY

"Assembly," in the context of item 807.00, signifies the fitting or joining together of parts in themselves already finished manufactured or fabricated components. *J. E. Bernard & Co. v. United States*, 57 CCPA 52, 420 F. 2d 1403 (1970); *C. J. Tower & Sons of Buffalo, Inc. v. United States*, 62 Cust. Ct. 643, 304 F. Supp. 1187 (1969); 19 CFR 10.12(b). The "tipping" operation is not an act of assembly because it is the process of completing the fabrication of the knit glove shell that was commenced in the United States. Thus the knit glove shell was not a finished manufactured or fabricated component prior to the "tipping" operation.

## ITEM 807.00—PHYSICAL IDENTITY TEST

Physical changes in form or shape of the article exported from the United States do not necessarily lead to loss of "physical identity" within the meaning of clause (b) of item 807.00, as amended. The test specified in item 807.00, as amended, is whether the fabricated components have been changed in form, shape, or otherwise to such an extent that they have lost their physical identity in the assembled article. The testimony and exhibits demonstrate that the knit glove shells did not lose their physical identity by reason of operations performed in Haiti. See *United States v. Baylis Brothers Co.*, 59 CCPA 9, 12, 451 F. 2d 643, 646 (1971).

## ITEM 807.00—ADVANCED IN VALUE

The various operations performed in Haiti increased the value and improved the condition of the knit glove shells. The "tipping" operation was not an operation "incidental to the assembly process" of precut palms with the knit glove shells. The procedures involved in the "tipping" operation were not *ejusdem generis* with "cleaning, lubricating, and painting," and were not of a minor nature as contemplated by the legislative history of item 807.00, as amended. See H.R. Rep. No. 342, 89th Cong., 1st Sess. 48-49 (1965).

Court No. 75-12-03110

Port of Milwaukee

[Judgment for defendant.]

(Decided February 1, 1979)

*Barnes, Richardson & Colburn* (Steven P. Sonnenberg and Robert E. Burke of counsel) for the plaintiff.

*Barbara Allen Babcock*, Assistant Attorney General (Bruce M. Mitchell and Bernard J. Babb, trial attorneys), for the defendant.

RE, Chief Judge: The question presented in this action pertains to the lawful customs duties to be assessed on certain acrylic and wool knit gloves exported from Haiti and entered at the port of Milwaukee, Wis.

The acrylic gloves were classified under item 704.85 of the Tariff Schedules of the United States [TSUS] as unornamented knit gloves of manmade fibers, and assessed at 25 cents per pound plus 32.5 percent ad valorem. The wool gloves were classified under item 704.65, TSUS, as modified, as wool gloves valued over \$4 per dozen pairs, and assessed at 37.5 cents per pound plus 18.5 percent ad valorem. Duty was assessed on both types of gloves under item 707.00, TSUS, as amended, upon the full appraised value of the gloves less the cost or value of precut palms assembled with the knit glove shells in Haiti, which were fabricated components of the United States.

Plaintiff does not dispute the classification, but challenges the refusal of the customs officials to make an allowance for the cost or value of the knit glove shells under item 807.00, TSUS.

Item 807.00, as amended by Public Laws 89-241 and 89-806, pursuant to which the allowance is claimed, provides:

"Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting--

A duty upon the full value of the imported article, less the cost or value of such products of the United States . . ."

Plaintiff contends that the knit glove shells meet every requirement of item 807.00, TSUS, and, therefore, are entitled to the prescribed duty allowance.

Defendant disputes this claim and maintains that plaintiff has failed to prove compliance with clauses (a), (b), and (c) of item 807.00, TSUS.

At the outset, reference may be made to the burden of proof that the plaintiff must bear in the present action. To prevail, plaintiff must rebut the statutory presumption of correctness, which provides that, "[i]n any matter in the Customs Court: (a) The decision of the Secretary of the Treasury, or his delegate, is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging a decision." 28 U.S.C. 2635. See discussion in *United States v. New York Merchandise Co.*, 58 CCPA 53, 435 F. 2d 1315 (1970).

Under item 807.00, TSUS, the governing statutory provision, in order to be entitled to the claimed allowance, plaintiff must establish that:

- a) the glove shells were exported in condition *ready for assembly without further fabrication*;
- b) the glove shells had not lost their physical identity by change in form, shape, or otherwise; and that
- c) they *had not been advanced in value, or improved in condition abroad*, except by being assembled, and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.

It is clear beyond doubt that the statutory allowance cannot be granted unless all three of the statutory requirements are satisfied. The statutory language is clear, and it is the duty of the courts to give effect to the legislative policy expressed in a valid statute.

In general terms, therefore, the question presented is whether plaintiff has rebutted the statutory presumption of correctness which attaches to the action of the customs officials in not granting the claimed allowance under item 807.00, TSUS. More specifically, it is whether plaintiff has succeeded in bearing its burden of proof by establishing that the knit glove shells were "assembled abroad" in compliance with the statutory requirements set forth in clauses (a), (b), and (c) of item 807.00, TSUS.

*Summary of operations performed abroad*

The steps performed in plaintiff's plant in Wisconsin were described by two of plaintiff's witnesses: Mr. James Ertl, research director of Zwicker Knitting Mills, and Mr. Patrick Hughes, manufacturing manager of knitting accessories for Zwicker Knitting Mills.

The glove shells were knit in Wisconsin on knitting machines specially modified by plaintiff. The knitting machines could not complete or finish the fingertips of the glove shells. The knit glove shells have a yarn "float," or piece of yarn, that is a continuation of the knit glove shell that is used to close the fingertips in Haiti. The palms were die-cut on a clicker in plaintiff's factory from regular leather skins. The knit glove shells and the pre-cut palms were then exported to Haiti. In one of the entries, a separate piece of yarn was exported with the knit glove shells and was used to close the fingertips.

The steps or operations performed in Haiti were described by one of plaintiff's witnesses, Mr. John R. Vandenberg, technical director of plaintiff's Haitian operation. Mr. Vandenberg testified that the merchandise arrived in Haiti in large shipping cartons. Upon arrival, the shipments were broken down. The knit glove shells, and in one of the entries, the separate piece of yarn, were moved to the department where the fingertips were finished or completed in what was called a "tipping" operation.

In the first step in the "tipping" operation, the yarn "floats," which are continuations of yarn between the open fingertip and base of the finger, were cut at the base of the finger. The glove finger was placed over a metal post large enough to fill a glove finger. The top row of knitted loops was unraveled to expose new, clear loops. A dulled needle was threaded with the yarn "float" and passed through the row of loops on one side of the fingertip. The needle and yarn were pulled through, the glove was turned on the post and the needle and



yarn pulled through the loops on the other side of the fingertip. The top rows of stitches on each side were pulled together by stitches across the top of the fingertip about three-quarters of the way across before three tacking or stay stitches were made. On the fourth tacking or stay stitch, the needle was brought down inside the finger and out. The yarn was then trimmed. This process was repeated for each of the five fingertips of the knitted glove shells.

When the "tipping" operation was completed, the gloves were turned inside out, and were run between rotating wire brushes. They were then turned rightside out and tumbled in a large dryer.

Thereafter, the knit glove shells were placed on wire forms and passed through a steam tunnel for shaping before being inspected for flaws. The gloves were then paired.

After the completion of the "tipping" operation and the subsequent processing, the precut palms were sewn on the gloves. After the palms were sewn onto the gloves, the completed gloves were again shaped and inspected before being ticketed, packed and exported to the United States.

Mr. Vandenberg demonstrated the various steps in the "tipping" operation on one fingertip of a sample glove shell that had been introduced into evidence.

Plaintiff introduced as exhibits a series of photographs illustrating the steps in the "tipping" operation. Also introduced into evidence were samples of the knit glove shells before "tipping," and as imported into the United States as completed gloves.

*Requirements of clause (a) of item 807.00*

In determining whether the knit glove shells comply with the requirements of clause (a) of item 807.00, TSUS, the initial question is whether they were "fabricated components" exported "in condition ready for assembly without further fabrication." More specifically, the question is whether the "tipping" operation performed in Haiti constituted a further fabrication. There can be no doubt that if there was "further fabrication," the knit glove shells do not meet the statutory requirements of clause (a) of item 807.00, TSUS.

Plaintiff claims that the knit glove shells were fabricated components in condition ready for assembly without further fabrication when exported. Plaintiff labels the "tipping" operation an assembly process whereby the yarn "float," or the separate piece of yarn, is "assembled" with the knit glove shell to form a knit glove.

Defendant, contending that the knit glove shells were not "ready for assembly" as required by clause (a), objects to plaintiff's studied reference to the "tipping" operation as an "assembly." Defendant

contends that when exported, the glove shells were not completed "fabricated components." According to the defendant, the "tipping" operation was a further fabrication necessary to complete or finish the component material (knit glove shells) for assembly with the pre-cut palms. Hence, the knit glove shells could not be ready "for assembly without further fabrication."

Although the statutory requirement is clear, there is no one, all-embracing definition of what steps or processes constitute "further fabrication" within the meaning of item 807.00, TSUS. Whether a particular process constitutes a "further fabrication" depends upon the facts of the particular case. In the recent case of *Rudolph Miles v. United States*, 65 CCPA —, 567 F. 2d 979 (1978), Judge Rich, writing for the Court of Customs and Patent Appeals appropriately noted that:

"With regard to the requirement of clause (a), we agree with the appellee that 'In its present form, item 807.00 \* \* \* basically encompasses only American merchandise returned without substantial change or improvement.' Of course, whether substantial change or improvement has occurred is to be determined from the facts of each case." 567 F. 2d at 982.

In *Rudolph Miles*, the appellate court determined that the burning of 31 approximately 1-inch holes, two slots approximately 14 by 3 inches and one slot 10 by 2½ inches, in a 55-foot steel Z-beam to be assembled into a railroad boxcar was not such a substantial change as to constitute a further fabrication. The slots were burned into the Z-beams to allow insertion of draft keys at each end, which fit the couplers to the yokes, and to allow the brake piping to pass through. The 31 holes were burned into the Z-beams to permit installation of wear plates to protect the Z-beams from damage and support plates to maintain additional parts that are attached to the Z-beams.

The appellate court recognized that, viewed in isolation, the operations performed on the Z-beams seemed to produce substantial changes. The court, however, determined that, in relation to the massive size of the steel Z-beams, the changes and improvements made were not so extensive as to constitute a "further fabrication":

"[T]he components require their own appropriate techniques because they are *large* steel parts. Such parts must be rigidly secured if they are to withstand the stresses that they must as boxcar components. Thus, in perspective, burning the slots and holes of the aforesaid dimensions in 55' steel Z-beams to permit their assembly is not such substantial change as constitutes further fabrication." 567 F. 2d at 983. (*Italic in original.*)

It was clear in *Rudolph Miles* that the Z-beams were completed "fabricated components." The question presented pertained solely to the steps or processes performed on admittedly finished components. In reaching its determination that the processes did not constitute a further fabrication, the appellate court looked not only to the actual steps performed, but also considered the cost and amount of labor expended. It expressly noted that the "component Z-beams [did] not require *significant* labor to enable them to be incorporated into box-cars." 567 F. 2d at 982. (*Italic* in original.) The court stated that "[t]he evidence established that the total labor in Mexico required a maximum of (104 minutes at a cost of \$12 (the value of a pair of Z-beams being alleged as \$395), or only 3 percent of the value of a beam." *Id.*

Not all operations to which an article may be subjected for assembly will necessarily preclude qualification for allowance under item 807.00, TSUS. Plaintiff, citing *General Instrument Corp. v. United States*, 60 CCPA 178, 480 F. 2d 1402 (1973), urges that the "tipping" operation is an example of an operation constituting an assembly process within the purview of clause (a). The *General Instrument* case, however, is readily distinguishable. In that case, anode foil, cathode foil, paper, metal tabs, plastic insulating film, and cellophane tape were exported from the United States to Taiwan for assembly into electrolytic capacitors. All of the components were exported in rolls of the width necessary for assembly except the anode foil. The only operation to which these items were subjected for the actual assembly process was cutting some of the components to length, and, in the case of the anode foil, trimming the edges to the proper width. To the same effect, see *United States v. Texas Instruments Inc.*, 64 CCPA 24, 545 F. 2d 739 (1976) (silicon slices); *General Instrument Corp. v. United States* 61 CCPA 86, 499 F. 2d 1318 (1974) (television deflection yokes) and *General Instrument Corp., v. United States*, 59 CCPA 171, 462 F. 2d 1156 (1972) (transistors).

In the present action, the yarn "float" is cut from the knit glove shell, and is used in the "tipping" operation. It is not the cutting of the yarn "float," but the completion of the fingertips by the "tipping" operation, that is crucial as to whether there was an "assembly" or a "further fabrication."

In *E. Dillingham, Inc. v. United States*, 60 CCPA 39, 470 F. 2d 629 (1972), the opening, oiling, and carding of bulk fibers, which were assembled with fabric to produce papermakers' felts, constituted a further fabrication of the fibers. The court noted that "[w]hat was

exported here was a fiber mass in bulk on which much further labor was expended to put it into the condition required to enable it to be needled into the fabric." 60 CCPA at 44, 470 F. 2d at 633.

Similarly, in *The Rubberset Co. v. United States*, 73 Cust. Ct. 107, C.D. 4560, 383 F. Supp. 1403 (1974), nylon filaments of American origin were shipped in bulk to Canada where they underwent various sorting and selection processes prior to their assembly into paintbrush knots and paintbrushes. The court held that this interim processing, without which the filaments as exported would not have been capable of being assembled, constituted a "further fabrication" within the meaning of clause (a) of item 807.00.

The "tipping" operation in the present case constitutes an even clearer example of "further fabrication." That "to fabricate" means to construct or manufacture may be gleaned from any standard dictionary. The "tipping" operation is nothing less than the completion or finishing of the manufacturing process that was begun by the knitting machine in the Wisconsin plant. The testimony of plaintiff's director of the Haiti operation, Mr. John R. Vandenberg, makes this clear. The yarn "float" that is used to close the fingertips is, in all but one case, an extension of the very same yarn used to knit the glove shells, and is cut from the knit component only moments before it is used to make the fingertips. In one of the entries, a separate piece of yarn is exported with the knit glove shell to be used in the "tipping" procedure. This yarn is the same type of yarn used to knit the glove shells, and, according to Mr. Vandenberg, comes from yarn ends from the knitting of other gloves.

The yarn "float" is not used simply to sew the fingertips closed. Rather, it is passed through the top row of loops left by the machine knitting process on each side, and is passed through the top row of stitches about three-quarters of the way across before three tacking or stay stitches are taken across the top of the tip. In relation to the glove shell, this procedure is substantial, and, regardless of the word or label selected to describe it, is in fact an indispensable completion or finishing of the knitting process.

This conclusion is fully supported by the testimony on cross-examination of Mr. Patrick Hughes, plaintiff's manufacturing manager of knitting accessories. Mr. Hughes testified that the knitting machines could knit a complete glove shell with fingertips closed on certain glove styles, but could not complete the styles of gloves that are the subject of this action. Other than programming the knitting machines for the pattern to be knit, and supplying the machines with yarn, the only hand labor required in the manufacturing process in the United States was cutting and separating the knit glove shells as they came

off the knitting machines. When the knit glove shells were exported from the United States, they were knit only to the extent that the knitting machines were capable of knitting on these particular styles. They were not in fact completely knit. It was left to the intensive labor, by hand, in Haiti to finish the fabrication process commenced in the United States.

The "tipping" operation is clearly a "further fabrication" because it actually constructs a portion of the glove that did not exist before, namely the fingertips. As described by Mr. Vandenberg, it is a manufacturing, construction or fabrication operation. Unlike the *General Instrument* case, the "tipping" operation performed on the knit glove shells does not "assemble" or put together two components that are already made and completed. Rather, it completes one single component by creating something that did not exist before, that is, a fingertip, an indispensable part of the glove shell.

The court does not agree that the use of the same material (yarn) that makes up the component (knit shell) to construct a further part or portion of that component is a mere "assembly." Before the "tipping" operation, the glove shell was incomplete as a fabricated component. It is only after the fingertips are manufactured, constructed or fabricated, with a continuation of the very yarn used to knit the glove shell, that the glove shell becomes a fabricated component.

Unlike the operations performed on the Z-beams in *Rudolph Miles v. United States*, 65 CCPA—, 567 F. 2d 979 (1978), the "tipping" operation on the knit glove shells required a significant amount of labor. In the *Rudolph Miles* case, the operations performed abroad on the 55-foot steel Z-beams required 104 minutes of labor at a cost of \$12, or about 3 percent of the value of the beam. In contrast, by plaintiff's own admission, the so-called tipping operation required 11 separate steps.

Mr. Vandenberg testified that it took approximately 30 seconds to "close" one fingertip, or  $2\frac{1}{2}$  minutes to close all the fingertips of one glove shell. However, in his demonstration of the "tipping" operation, Mr. Vandenberg required approximately 4 minutes to complete one fingertip. Even allowing for the one brief interruption, and the fact that Mr. Vandenberg was describing the process as he performed it, the discrepancy is substantial. Assuming, however, that the estimate of 30 seconds per finger, or  $2\frac{1}{2}$  minutes per glove, is correct, it is important to note that Mr. Vandenberg also testified that the knitting machines required approximately 5 minutes to knit one glove shell. The "tipping" operation, therefore, required half as much time as the knitting of the entire glove shell.

On the question of the cost of the "tipping" operation, the testimony of Mr. Anderson, plaintiff's treasurer and comptroller, is also enlightening. Although it is unclear whether Mr. Anderson was referring to the cost of performing the "tipping" operation in Wisconsin or in Haiti, it is nevertheless clear that the cost of performing the "tipping" operation in Haiti was a significant portion of the total cost of manufacturing the gloves. On cross-examination, in answer to the question "if it cost more money to close the fingertips on the pair of gloves in front of you than it cost to manufacture the knitted glove shell on the machine in Wisconsin," Mr. Anderson responded, "yes, it would." Mr. Anderson agreed that "the cost of the knitting operation of the entire glove shell is less than the cost of the operation of closing the fingers."

The evidence shows that the "tipping" operation must be completed as the next processing step after the knitting of the glove shell since without "tipping" the yarn would unravel during the brushing and steaming steps. As in the case of *The Rubberset Co. v. United States*, 73 Cust. Ct. 107, 383 F. Supp. 1403 (1974), "without this essential processing the (material) as exported would not be capable of being assembled." 73 Cust. Ct. at 111, 383 F. Supp. at 1405. Furthermore, when viewed in relation to the entire manufacturing process of the gloves, the "tipping" operation, in the words of the *Rudolph Miles* case, constitutes a "substantial change or improvement." 567 F. 2d at 982.

Plaintiff, nevertheless, asserts that the "tipping" operation is more appropriately viewed as an act of assembly rather than as a "further fabrication."

It is common knowledge that "to assemble" means to fit or join components or parts together. "Assembly," in the present context, signifies the fitting or joining together of "finished" manufactured or fabricated parts or components. *Webster's Third New International Dictionary* (1966) defines an "assembly" to be:

"5a: the act or process of building up a complete unit (as a motor vehicle) using parts already in themselves finished manufactured products \* \* \*."

The word "assemble" is defined in *Webster's Third New International Dictionary* (1966) as follows:

"2: to bring together: as—a: to put or join together usu. in an orderly way with logical selection or sequence \* \* \* b: to fit together various parts of so as to make into an operative whole [sic] \* \* \*."

The judicial interpretations of the word "assemble" closely follow the lexicographic definition, and acknowledge its importance. In *C. J.*



*Tower & Sons of Buffalo, Inc. v. United States*, 62 Cust. Ct. 643, 304 F. Supp. 1187 (1969), the court noted that:

"[T]he framers of item 807.00 have used one form or another of the term 'assemble' with the same understanding of its scope as that imparted by contemporary lexicographers, namely, that the term is used to describe the joining or coming together of *solids*." (Italic in original.) 62 Cust. Ct. at 647, 304 F. Supp. at 1190.

In the case of *J. E. Bernard & Co. v. United States*, 57 CCPA 52, 420 F. 2d 1403 (1970), the Court of Customs and Patent Appeals considered the meaning of the word "assembly" as used in paragraph 368(c) of the Tariff Act of 1930. Despite the differing context, the court nevertheless quoted the lexicographic definitions of "assembly" and "assemble" and determined that "an assembly . . . results when two or more existing parts or pieces are joined together . . ." 57 CCPA at 58, 420 F. 2d at 1407.

The Customs Regulations define assembly in terms of articles assembled abroad with United States components in section 10.12(b):

"(b) *Assembly*. 'Assembly' means the fitting or joining together of fabricated components." 19 CFR 10.12(b).

It is apparent that the judicial and lexicographic definitions of "assembly," as well as the Customs Regulations, envision an assembly which requires finished manufactured or fabricated components which are "joined" together to form an article. Clearly, "assembly" does not include the manufacture, production or fabrication of the essential parts to be used in the assembly process.

In addition to the guidance provided by the decided cases, it is necessary constantly to recall the legislative policy expressed in the governing statute. The congressional allowance permitted by the statute is limited to products of the United States "assembled abroad." The statutory language does not speak of "fabricated components," complete or incomplete, finished or unfinished. Such an interpretation would clearly do violence to clause (a) of item 807.00, TSUS, which expressly states "ready for assembly without further fabrication."

It is plaintiff's claim that the knit glove shell was a fabricated component when exported since no further knitting was performed after the machine had knit the glove shell. Plaintiff supports its assertion that the "tipping" operation is an assembly by drawing an analogy between the act of closing the fingertip with a length of yarn and a needle, and the sewing together of precut pieces of fabric, which is clearly an assembly.

Plaintiff places primary reliance on the case of *Baylis Brothers Co. v. United States*, 64 Cust. Ct. 256, C.D. 3987 (1970), *aff'd*, 59 CCPA



9, 451 F. 2d 643 (1971). In the *Baylis Brothers* case, precut dress fronts were exported to be "smocked" and then returned. The dress fronts were fabricated in the United States by cutting fabric to a predetermined size and shape and stenciling a pattern of dots onto the fabric. The smocking was performed abroad by sewing thread through the stenciled dots to obtain shirrs or gatherings of the fabric. The smocking did not involve sewing the precut dress fronts onto other pieces of fabric, but rather the sewing gathered the fabric of the dress front to itself to create the shirrs. The smocked dress fronts were imported to be assembled into children's dresses in the United States. The court held this smocking operation to be an assembly of the dress front with the thread. In its reply brief, plaintiff asserts that the only "difference between the fabric and thread in the *Baylis* case and the fabric and yarn in this case, insofar as item 807.00, TSUS, is concerned is that in this matter the yarn must be cut prior to the sewing process."

The court does not agree because there is another, more important distinction between the *Baylis Brothers* case and the case at bar. In *Baylis Brothers* the fabric or component was completely fabricated. It not only required no cutting, but more important, it also required no further weaving prior to assembly. The operation merely sewed the fabric in such a way as to create shirrs or "gathers." The dress fronts were completely fabricated before the "smocking" took place, and no new portion of the dress fronts was created by that operation. In contrast, the knit glove shells were not completely fabricated when exported from the United States. The "tipping" operation, rather than being an assembly process by sewing, was a further fabrication by a finishing or completion of the knitting that the knitting machine could not complete on these particular styles of gloves.

The knit glove shell becomes a fabricated component "in condition ready for assembly" only after the fingertips have been constructed. It is only after this manufacturing operation takes place that the glove shells become a fabricated component like the precut dress fronts in the *Baylis Brothers* case.

Furthermore, it is futile to stress the *Baylis Brothers* case as a controlling precedent when it merely involved the simple joining of thread to dress fronts following a predetermined pattern. Judge Baldwin, writing for the Court of Customs and Patent Appeals in the *Baylis* case, dismissed the issue of whether the precut dress fronts met the requirements of clause (a) of item 807.00, TSUS, by finding that "the smocking operation is well within the common meaning of the term 'assembly,' since the operation merely consists in joining the two components together according to the stenciled designs." 59

CCPA at 11, 451 F. 2d at 645. The issue that occupied the court's attention in *Baylis Brothers* was whether the components failed to meet the requirements of clause (b) of item 807.00, TSUS, by having changed in form, shape, or otherwise to such an extent as to have lost their physical identity.

The "tipping" operation is the completion or fabrication of the single major component of the knit gloves. Since the knit glove shells were not "finished manufactured products," they were not ready for "assembly" in the common or dictionary meaning of the word. Viewed in a statutory setting for purposes of the item 807.00, TSUS, allowance, they were not fabricated components ready for assembly without further fabrication. As stated in the *General Instrument Corp.* case, "classification under item 807.00 depends upon the relationship of the disputed element to the whole." 60 CCPA at 182, 480 F. 2d at 1405-06. Viewing the "tipping" operation in relation to the entire manufacturing process, it clearly constitutes a "further fabrication" of the knit glove shells and not an assembly of fabricated components.

That the "tipping" operation is a "further fabrication," and not an "assembly," may be demonstrated also by a comparison of the "tipping" operation to the process of sewing the precut palms onto the knit glove shells. The precut palms had holes punched in them where they were to be sewn onto the glove shells. The precut palms required no further steps before assembly or joining with the glove shells. This operation was clearly an assembly of the type performed in the *Baylis Brothers* case. The Customs Service recognized sewing of the precut palms onto the completed knit glove shells as an act of assembly, and the allowance permitted by item 807.00, TSUS, was granted.

Nor can the "tipping" operation be construed to be a subassembly operation prior to final assembly with the precut palms. It is well recognized in customs law that an article is not precluded from item 807.00 allowance solely because it is subjected to a subassembly process prior to assembly. *Rudolph Miles v. United States*, 65 CCPA —, 567 F. 2d 979 (1978); *General Instrument Corp. v. United States*, 60 CCPA 178, 480 F. 2d 1402 (1973). However, the subassembly process must itself be an assembly and not a further fabrication. For the same reasons that the "tipping" operation could not be an assembly process, it cannot be a subassembly process.

#### *Requirements of clause (b) of item 807.00*

Although defendant, in its answer, denied plaintiff's allegation that the knit glove shells did not lose their physical identity by change in form, shape or otherwise, it did not address this issue at the trial, or

in its brief. The court agrees with plaintiff that, for purposes of clause (b) of item 807.00, TSUS, the knit glove shells had not "lost their physical identity . . . by change in form, shape, or otherwise" by reason of the "tipping" operation.

Physical changes in the article do not necessarily lead to a loss of "physical identity" within the meaning of clause (b) of item 807.00, TSUS. In the case of *United States v. Baylis Brothers Co.*, 59 CCPA 9, 12, 451 F. 2d 643, 646 (1971), the Court of Customs and Patent Appeals stated that:

The legislative history makes it equally apparent, however, that Congress did not intend to exclude articles from item 807.00 merely because the American components had undergone some change of form or shape. The test specified in item 807.00 is whether the components have been changed in form, shape, or otherwise to such an extent that they have lost their *physical identity* in the assembled article. The term "physical identity" was used to exclude from item 807.00 those assembled articles whose American components are "chemical products, food ingredients, liquids, gases, powders," and the like. (Footnote omitted; *italic* in original.)

This physical identity test has been reiterated in two subsequent cases: *General Instrument Corp. v. United States*, 61 CCPA 86, 499 F. 2d 1318 (1974); *General Instrument Corp. v. United States*, 60 CCPA 178, 480 F. 2d 1402 (1973).

The "tipping" operation, although working a change in the form or shape of the knit glove shell, did not change the glove shells to such an extent that they lost their physical identity. The knit glove shells did not lose their physical identity by the completion of the fingertips. This may be seen from the exhibits submitted of the knit glove shells, which show the state of the glove shells before and after the "tipping" operation, and from various photographs which illustrate the "tipping" operation.

*Requirements of clause (c) of item 807.00*

It order to qualify for the claimed item 807.00, TSUS, allowance, clause (c) requires that the articles "have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting." In the present action, the articles exported from the United States were clearly "advanced in value or improved in condition" by the various operations performed in Haiti.

For the reasons discussed under clause (a), the "tipping" of the glove shells was a "further fabrication," and not an act of assembly. For the reasons that follow, it was not an operation incidental to the assembly of the precut palms to the knit glove shells.

Any doubt as to the type of operation that Congress intended to be considered "incidental to the assembly process" is resolved by the applicable legislative history in H. Rept. No. 342, 89th Cong., 1st Sess. 48-49 (1965), accompanying H.R. 7969 (subsequently enacted as the Tariff Schedules Technical Amendments Act of 1965, Public Law 89-241), which stated that:

It appears that under the language of item 807.00 minor operations such as painting incidental to assembly abroad may be precluded, and that in certain respects the item is ambiguous, with the result that it imposes undue administrative burdens on customs officers.

Section 72 of the bill would amend item 807.00 so that it would apply to articles assembled abroad in whole or in part of fabricated components, the product of the United States, which . . . (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.

\* \* \* \* \*

The amended item 807.00 would specifically permit the U.S. component to be advanced or improved "*by operations incidental to the assembly process such as cleaning, lubricating, and painting.*" It is common practice in assembling mechanical components to perform certain incidental operations which cannot always be provided for in advance. For example, in fitting the parts of a machine together, it may be necessary to remove rust; to remove grease, paint, or other preservative coatings; to file off or otherwise remove small amounts of excess material; to add lubricants; or to paint or apply other preservative coatings. It may also be necessary to test and adjust the components. Such operations, *if of a minor nature incidental to the assembly process*, whether done before, during, or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad. (Italic added.)

The language of clause (c) states categorically that for the statutory allowance to be granted, the U.S. components must "have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process." To facilitate interpretation and to remove doubt as to the operations that were deemed "incidental to the assembly process," the statute gave as specific examples operations "*such as cleaning, lubricating, and painting.*" (Italic added.)

Completing the fingertips of the knit glove shells is clearly not ejusdem generis with "cleaning, lubricating, and painting." Certainly, it is not of a "minor nature" as contemplated by the House report.

In the *Rudolph Miles* case, the burning of holes and slots in the steel Z-beams was found to be a change of a minor or insubstantial

nature in relation to the massive, 55-foot steel Z-beam. In contrast, the "tipping" operation on the knit glove shells cannot be considered as incidental. The testimony of plaintiff's witnesses, showed the complexity and importance of the "tipping" operation in relation to the entire fabrication or manufacturing process. The "tipping" operation was a critical step prior to assembly of the precut palms with the knit glove shells. The fingertips had to be closed before the glove shells were brushed, steamed, and shaped. Furthermore, the "tipping" operation consisted of 11 steps requiring approximately half as much time to complete as the knitting machine required to knit the entire glove shell. Moreover, the cost of completing the fingertips constituted a substantial part of the cost of the completed glove.

In *United States v. Texas Instruments Inc.*, 64 CCPA 24, 545 F. 2d 739 (1976), the scoring and breaking of a silicon slice along provided "streets," to separate the individual transistor areas that had been commonly created on the slice, was determined to be an operation incidental to the assembly process. Basing its decision on the *General Instrument* cases discussed under clause (a) the appellate court noted that "[t]he transistor chips themselves are unchanged after the scoring and breaking operation; they are merely separated, as the wire and foil were separated from the supply spools in the prior [*General Instrument*] cases." 64 CCPA at 30, 545 F. 2d at 743-44.

Unlike the transistor chips in the *Texas Instruments* case, the knit glove shells in this action are substantially advanced in value or improved in condition after the "tipping" operation. That operation created something new that did not exist before, viz. fingertips for the glove shell, thereby completing the knit glove shell component. Unlike the scoring and breaking of the silicon slice in the *Texas Instruments* case, the "tipping" operation is not "incidental to the assembly process."

The conclusion that the "tipping" operation is not an operation "incidental to the assembly process" is supported by comparison of the "tipping" operation to the brushing, tumbling, steaming, and shaping steps that the glove shells underwent prior to assembly with the precut palms. The brushing operation consisted of turning the gloves inside out and passing them between two rotating wire brushes. After brushing, the glove shells were placed in a large dryer for tumbling. The glove shells were next placed on wire forms and passed through a steam tunnel for shaping. These operations are of the type of minor operations contemplated by Congress, and are incidental to the assembly of the glove shell with the precut palms. They leave the glove shell essentially unchanged. Without these steps, the gloves, when assembled, would still be wearable. In the absence of the "tip-

ping" operation, the gloves would be incomplete, unfinished, and not usable.

In order to prevail in this action, plaintiff was required to prove that the knit glove shells, and the separate yarn float in one entry, "were exported in condition ready for assembly without further fabrication" and has "not lost their physical identity in such articles by change in form, shape, or otherwise." Plaintiff was also required to establish that the knit glove shells had "not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting." Plaintiff has failed to bear all three elements of its burden of proof.

Upon all the evidence of record, it is the determination of the court that the plaintiff, notwithstanding the able presentation of its case, has not succeeded in rebutting the presumption of correctness as to clauses (a) and (c) of item 807.00, TSUS. Having failed to establish compliance with the requirements stated in clauses (a) and (c), plaintiff is not entitled to the duty allowance claimed under item 807.00 of the tariff schedules.

Judgment will be entered accordingly.

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(C.D. 4787)

ENDICOTT JOHNSON CORPORATION *v.* UNITED STATES

*Footwear—Ornamented*

Cotton canvas shoe uppers held properly classifiable under item 386.50 of the tariff schedules as articles of textile materials, nsfp, not ornamented, as claimed by plaintiff since the arch stitching thereon is not ornamental.

Court No. 75-7-01897

Port of New York

[Judgment for plaintiff.]

(Decided February 1, 1979)

*Rode & Qualey* (John S. Rode, Michael S. O'Rourke and Patrick D. Gill of counsel) for the plaintiff.

*Barbara Allen Babcock*, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section, and *Madeline B. Cohen*, trial attorney), for the defendant.

MALETZ, Judge: In this case the court is called upon to determine the proper tariff classification of certain cotton canvas shoe uppers

that were exported from Japan in 1972 and entered at the port of New York during the same year. Upon entry, the merchandise, described on the invoices as "Canvas Shoe Uppers," was classified by the government under item 380.00 of the Tariff Schedules of the United States (TSUS) as "\* \* \* other men's or boys' wearing apparel, ornamented: Of cotton" and assessed with duty at the rate of 35 percent ad valorem.

At trial, defendant abandoned its classification under item 380.00<sup>1</sup> and now asserts that the merchandise is properly classifiable under item 386.04 as "Articles not specially provided for, of textile materials: \* \* \* other articles *ornamented*; Of cotton," dutiable at the rate of 40 percent ad valorem. (*Italic added.*)

Plaintiff claims the merchandise is properly classifiable under item 386.50 as "Articles not specially provided for, of textile materials: \* \* \* Other articles, *not ornamented*: Of cotton: \* \* \* Other," subject to duty at the rate of 14 percent ad valorem. (*Italic added.*)

The sole question before the court is whether the two parallel rows of stitching on each side of the imported uppers known as "arch stitching" are or are not ornamental.

The pertinent provisions of TSUS read as follows:

Schedule 3 Headnotes:

\* \* \* \* \*

3. For the purposes of the tariff schedules—

(a) the term "*ornamented*", as used with reference to textile fabrics and other articles of textile materials, means fabrics and other articles of textile materials which are ornamented with—

(i) fibers, filaments (including tinsel wire and lame), yarns, or cordage, any of the foregoing introduced as needlework or otherwise, including—

\* \* \* \* \*

(B) other types of ornamentation, but not including functional stitching or one row of straight hemstitching adjoining a hem;

\* \* \* \* \*

Schedule 3, Part 7, Subpart B:

Subpart B headnote:

1. This subpart covers articles, of textile

<sup>1</sup> Defendant abandoned its classification under item 380.00 (as well as its alternative claim under item 382.00 covering women's or girls' wearing apparel) in view of the decision in *The Westminster Corp. v. United States*, 78 Cust. Ct. 22, C.D. 4687, 432 F. Supp. 1055 (1977). In that case, the court held that certain vinyl uppers which were classified as wearing apparel and claimed to be classifiable as footwear could not be classified under either provision since the provisions in the tariff schedules for wearing apparel and footwear do not contain a "parts" provision.



materials, not covered elsewhere in the tariff schedules.

Articles not specially provided for, of textile materials:

[Defendant's claim]

Lace or net articles, whether or not ornamented, and other articles ornamented:

386.04	Of cotton-----	40% ad val.
*	*	*
*	*	*
*	*	*
*	*	*
*	*	*

[Plaintiff's claim]

Other articles, not ornamented:

Of cotton:

386.50	Other-----	14% ad val.
*	*	*
*	*	*
*	*	*
*	*	*
*	*	*

### *The Record*

The record in the case consists of a stipulation of fact, the testimony of 3 witnesses and 15 exhibits for the plaintiff, and 3 witnesses and 10 exhibits for the defendant.<sup>2</sup>

### *Description of the Imported Merchandise*

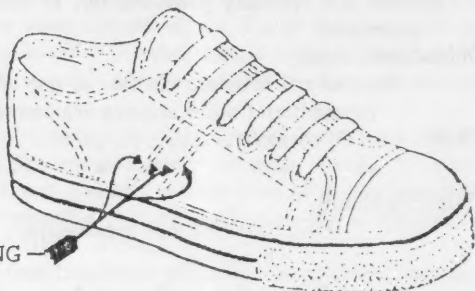
The imported merchandise consists (as previously indicated) of cotton canvas shoe uppers. These uppers were of both oxford (low-cut) and high top types and came in white and black colors in different sizes. After importation, soles were attached to the uppers, insoles and laces were inserted, and the merchandise was thereby made into sneakers.

The uppers contained two parallel rows of stitching extending from eyelets closest to the ankle of the wearer downward at a slight angle to the midpoint of the arch area. These two parallel rows of stitching are referred to in the trade as "arch stitching" and, as

<sup>2</sup> The witnesses for plaintiff were: (1) Richard Oris, general manager of quality assurance for the plaintiff, Endicott Johnson Corp., who was responsible for all inspection and testing at the plaintiff's seven shoe manufacturing plants; (2) Harold McGowan, president of the plaintiff, who was responsible for introducing the imported merchandise into the United States; and (3) John Galli, an employee of plaintiff, who was in charge of operations for plaintiff's W. T. Grant Co. account during the period here in issue when the uppers at bar were incorporated into basketball sneakers plaintiff manufactured and sold to the W. T. Grant chain.

The witnesses for the defendant were: (1) Robert Chase, division manager of quality assurance for Uniroyal, Inc.—a footwear manufacturer—who was in charge of his company's testing laboratories and responsible for its return goods policy; (2) Dan McCarthy, manager of product development of the Converse Rubber Co.—one of the largest manufacturers of footwear in the United States; and (3) Dr. Clifton Scaggs, a podiatrist.

noted before, the sole question before the court is whether or not this arch stitching—which is depicted below—is ornamental.



ARCH STITCHING—12

*Tests to Determine Strength of Uppers With and Without Arch Stitching*

Samples of the imported uppers were tested both by plaintiff and by the Uniroyal Co. for the defendant on a Scott Tester machine to demonstrate by the so-called grab method the comparative tensile strength of the imported uppers with and without the arch stitching. On the tests conducted by plaintiff, the portions of the uppers without arch stitching broke on the average at 64 pounds pressure, while the portions of the uppers with the arch stitching broke on the average at 102 pounds pressure. On the tests conducted for the defendant by Uniroyal, the portions of the uppers without arch stitching broke on the average at 70 pounds pressure, while the portions of the uppers with the arch stitching broke on the average at 90 pounds pressure. The conclusion drawn from defendant's tests as stated in a laboratory test report by Uniroyal was that: "The average strength at ultimate break is less on the \* \* \* [uppers] without [arch] stitching than on the \* \* \* [uppers] with [arch] stitching." (R. 338) <sup>3</sup>

<sup>3</sup> There is a Federal test for determining the breaking strength of a woven fabric by the grab method, i.e., Federal Test Method Standard No. 191, Method 5100. The record shows that that test method was not and could not be used in testing the uppers involved here because (1) the amount of fabric in the uppers is insufficient to comply with the Federal test requirements; and (2) the arch stitching is on the bias and is thus not measurable by the Federal test method since that method measures the strength of the warp and filling yarns.

It is to be added that a method of testing the wearability of an article in actual use is by wear tests in which the articles are issued to a group of persons who wear them in a variety of use conditions. Such wear tests are a way of determining the article's serviceability, comfort and consumer acceptability. The record indicates that plaintiff did not conduct wear tests on the sneakers in which the imported uppers were incorporated; the reason ascribed was that plaintiff does not conduct wear tests to determine the strength of fabrics.

*Testimony With Respect to Whether or not the Arch Stitching is Ornamental*

We summarize now the testimony in the record bearing on whether or not the arch stitching is ornamental. Plaintiff's first witness to testify on this aspect was its president, Mr. McGowan.

Mr. McGowan testified that he was responsible for introducing the merchandise in question into this country. This came about, he said, as a result of an agreement between plaintiff and the W. T. Grant Co. under which that company agreed to purchase from plaintiff, over a period of years, some 30 million pairs of sneakers utilizing the uppers in question. To carry out this agreement, the witness stated that plaintiff had to design an upper which would be suitable for a long-lasting PVC sole and which would at the same time be inexpensive enough so that the resultant pair of sneakers could meet Grant's retail price requirement of \$2.99. Mr. McGowan stated that the strongest type of material for the uppers was army duck but this was far too expensive for the \$2.99 retail price requirement since it would cost 25 cents a pair more than the material actually used. Thus, instead of using army duck, plaintiff utilized a 160-drill cloth with a web backing. Mr. McGowan testified that the arch stitching was added to this material—at a cost of  $2\frac{1}{2}$  cents per pair—to reinforce that point of the sneaker which gets the most pressure when the shoe is laced. According to the witness, the use of arch stitching by plaintiff goes back to 1937. He added that the stitches were put on the uppers to achieve "additional strength in that particular area of the shoe, which is called the arch area." (R. 167)

Continuing, Mr. McGowan testified that on the basis of his experience in the footwear industry, the arch stitching—which is white—does not serve to decorate or adorn the merchandise. According to the witness, in order for something to be ornamental or decorative, it must be readily visible. In this connection, he stated that 80 percent of the sneakers in issue were white with white stitching and since the arch stitching was also white, it was not visible unless one was very close to it. Under these circumstances, he concluded that the stitching could not be considered ornamental or decorative. He further stated that while the white arch stitching could be seen on the black sneaker, in that case it was no more decorative than the other white stitching on the shoe—which stitching is concededly nonornamental.

Mr. McGowan further testified that the arch stitching in issue was not considered ornamental by the buying public. This fact, he said, caused plaintiff to discontinue producing the item since ornamental

shoes "like the Adidas shoes and Pumas and the different types of shoes with red stripes and red stitching" took over the market. (R. 169)

On cross-examination, the witness stated that he did not believe that the white arch stitching gave the sneaker "a more expensive or classier look" (R. 222), particularly since the arch stitching on the white sneaker which represented 80 percent of the production was not very noticeable. On further cross-examination, he expressed the opinion that some customers would purchase a sneaker with arch stitching rather than one without arch stitching not on the basis that the arch stitching was ornamental, but on the basis that the arch stitching made the sneaker stronger. Finally, on this aspect, a tie-on tag attached to every pair of sneakers using the imported uppers sold by W. T. Grant contained the notation: "Arch Stitching Insures Upper Strength."

Another witness for plaintiff, John Galli, an employee of plaintiff since 1964, has been engaged in large-scale selling to customers such as W. T. Grant and has traveled throughout the United States to observe the retail market on a firsthand basis. As a result of his marketing background, Mr. Galli defined the term "ornamented" as used in the footwear industry as referring to something affixed to a shoe that has no utilitarian function. He testified that if stitching were primarily decorative and only incidentally utilitarian, the trade would still consider it utilitarian. The witness testified, however, that if the stitches were placed on a sneaker "primarily to enhance the appearance and to attract a customer," despite the fact that the stitches might incidentally make the upper stronger, he would consider the stitches to be decorative "if that was the intention." (R. 250) Finally, the witness testified that the arch stitching on the imported uppers was "definitely not decorative."

Defendant's first witness was Robert Chase, who as previously mentioned (note 2, *supra*) was division manager of quality assurance for Uniroyal in which capacity he was in charge of that company's testing laboratories and responsible for its return goods policy. Mr. Chase supervised the tests conducted by Uniroyal for the defendant to determine the strength of the uppers in issue with and without arch stitching and testified that "[i]n all instances \* \* \* the stitched upper, had a strength in excess of the unstitched sample \* \* \*." (R. 385) In his opinion, however, the arch stitching on the imported uppers served absolutely no utilitarian function and was placed on the upper for attractiveness or style. He testified that the arch stitching was for decorative purposes only because it did not join two parts together as did the remaining stitching on the imported uppers, which stitching he did not consider to be decorative. He stated that in

order for something to be decorative it need only be visible to someone—primarily the purchaser or the wearer—but conceded that this was his “opinion at the moment” and that his opinion was not necessarily shared by the industry. (R. 309)

Mr. Chase further testified that, in his experience reviewing returned merchandise, he has not found abrasion of the arch area to be any problem whatever with sneakers. He was also of the opinion that decorative stitches do not always have to be in contrasting colors. He then went on to emphasize that the arch stitching on the imported uppers “simulates an additional reinforcement on the shoe, which, in fact, does not exist.” (R. 368)

Finally, Mr. Chase agreed that forces are exerted in the area where the arch stitching is sewn and that if he wished to make an upper “more strong” he would place stitches in such an area. (R. 372)

Defendant's second witness, Dan McCarthy, manager of product development of the Converse Rubber Co., testified that stitching which joined two pieces of material together was utilitarian while stitching which did not join two pieces of material together was decorative. In the witness' opinion, the arch stitching found on the imported uppers was ornamental or decorative.

Mr. McCarthy added on cross-examination that sneakers are not ordinarily reinforced in the arch area; that the arch stitching simulates an extra piece of fabric; that in the past sneakers were made with such an extra piece of fabric on the inside for purposes of an “instep reinforcement” which added support to the instep; and that the industry at one time believed there was a need to reinforce the instep area and for that purpose placed strips inside the upper. Mr. McCarthy then testified that in some cases it is still necessary to support the arch or instep area.

The witness further stated that his company had made sneakers which had arch stitching similar to that here; that this stitching was purely ornamental and was added to make the sneaker more attractive; and that his company had never claimed in its advertising that the arch stitching had a utilitarian function of making the upper stronger.

Mr. McCarthy testified that in order for stitching to be decorative, it did not have to be visible to anyone but the purchaser or wearer. He added that ornamental or decorative stitching did not have to be in a contrasting color, but could be in the same color as the shoe. Mr. McCarthy explained that white stitching was used for ornamentation on white canvas sneakers because nonwhite stitching on an all white sneaker would detract from the eye appeal. Nonwhite stitching, he said, would cheapen the appearance of the shoe by giving

it a gaudy, blatant appearance, making it less "balanced." Since balancing is an important consideration in designing sneakers, Mr. McCarthy stated that white stitching is used for ornamentation on white sneakers since it would not be consistent with the overall design or motif of the sneaker to use thread of a different color. He explained that sneakers are designed to appeal to the consumer and that, in a shoe store, white stitching on a white canvas would be readily visible to the consumer.

Defendant's final witness was Dr. Clifton Scaggs, a podiatrist who indicated that a podiatrist is a licensed specialist in the medical, surgical, and orthopedic management of the human foot. Dr. Scaggs testified that the major weight-bearing portions of the foot are the ball and the heel and that the arch area of the normal foot does not bear weight in the gait cycle. He expressed the opinion that uniform arch supports found in some shoes have no utilitarian function. On cross-examination, he conceded that force was necessarily applied to the arch area of the shoe simply by putting a shoe on.

#### *The Law*

As set out before, the single issue in this case is whether or not the arch stitching is ornamental. For the reasons that follow, it is concluded that plaintiff has proven by a preponderance of the credible evidence that the stitching in question is primarily functional and not ornamental.<sup>4</sup>

#### *The Arch Stitching Is Functional*

Headnote 3(a)(i)(B) to schedule 3, TSUS, specifically excludes functional stitching from the term "ornamented." See, e.g., *The Baylis Brothers, Inc. v. United States*, 60 Cust. Ct. 336, 339, C.D. 3383, 282 F. Supp. 791, 794 (1968), *aff'd*, 56 CCPA 115, C.A.D. 964, 416 F. 2d 1383 (1969).

The word "functional" is defined in Webster's New International Dictionary (2d ed., 1956), as follows:

*functional* 1. Of, pertaining to, or connected with a function or functions; \* \* \*. 2. Performing or serving a function, as a useful purpose or special activity; designed, developed, considered, etc., with reference to a function or functioning; \* \* \*.

With these considerations in mind, the record establishes that the arch stitching in question performs the function of adding strength

<sup>4</sup> In reaching this conclusion, the court assumes *arguendo* that the doctrine of *United States v. New York Merchandise Co.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970), is applicable here. Accordingly, by virtue of the Government's original classification, the arch stitching in issue is presumed to be ornamental and it thus became plaintiff's burden to prove that the arch stitching is functional and not ornamental.

to the arch area of the upper. This is demonstrated by the tests of the imported uppers which make manifest that the uppers with the arch stitching were measurably stronger than the uppers without that stitching.

The record is equally clear that plaintiff caused arch stitching to be placed on each upper for the purpose of adding strength to the upper. As explained by Mr. McGowan, who was responsible for introducing the merchandise into this country, plaintiff chose to present to the public an upper which derived its added strength from the arch stitching rather than to make the upper out of unduly expensive army duck. Illustrative of how plaintiff's purpose was made known to the public is the tie-on tag containing the notation "Arch Stitching Insures Upper Strength" which was placed on every pair of W. T. Grant sneakers made with the imported uppers. In this connection, the term "purpose" is used in the same sense as in *The Baylis Brothers, Inc. v. United States, supra*, 60 Cust. Ct. at 341:

We agree that in determining whether the dresses are ornamented, the evidentiary issue, as stated above, is whether the primary purpose of the stitching is for decoration rather than utility. The term "purpose" as used here, as well as in the decisions cited above, must, of course, be understood to mean function rather than the subjective intent of the manufacturers. It is the resultant effect of, and not the claimed motivation for, the stitching which determines the issue.

Here, the "claimed motivation" and the "resultant effect" converge. The "claimed motivation"—offering the public a better all-around sneaker having a strengthened upper has been shown by the testimony of Mr. McGowan, the person who started the program. The "resultant effect" of arch stitching—greater strength—was demonstrated by both parties' tests.

Indeed, plaintiff's stated purpose for adding arch stitching to the uppers was supported by the following testimony on cross-examination of defendant's witness, Mr. McCarthy (R. 458):

Q. So at one time, apparently, there was a need, or the industry felt there was a need to reinforce the instep area and, in fact, did place strips inside the upper, is that correct?—A. Correct.

Q. Is it your testimony then, that while in the past the industry felt it was necessary to support the arch area or the instep area, it is no longer so necessary?—A. No.

Q. Then there is a necessity to support that area?—A. In some cases.<sup>5</sup>

<sup>5</sup> It is to be noted that on redirect examination Mr. McCarthy testified that he did not think it necessary to reinforce the instep area in a canvas sneaker. (R. 471).



Thus, the testimony of record establishes that the arch stitching in issue was employed in order to manufacture a stronger upper and was used in lieu of heavier duck material which would have been too expensive. To that extent, the stitching clearly performs a functional purpose, which satisfies the literal language of headnote 3(a)(i)(B), and also responds to the more stringent test enunciated in *The Baylis Brothers, Inc. v. United States*, *supra*, i.e., the stitching is primarily functional rather than primarily decorative. By strengthening the fabric of which the uppers were made, the arch support stitching permitted the plaintiff to substitute a lower cost fabric and thereby reduce the cost of the footwear ultimately produced from the imported uppers. Clearly, achieving an economic benefit by using arch support stitching cannot be characterized as an "ornamental" or "decorative" purpose.

Defendant, however, interjects a test of necessity, rather than functionality, as the decisive criterion in determining whether the stitching in question constitutes ornamentation. The essence of defendant's argument contained in its brief is as follows (br., p. 32):

\* \* \* It is clear that the "arch stitching" is not a necessary portion of either the upper or the sneaker without which there would be no upper or no sneaker, nor is the upper or sneaker incomplete and unfit for the purpose for which it was designed and intended to be used without the "arch stitching." \* \* \*

It is a generally established principle that stitching which is "necessary" to the completion of a garment will "conclusively" establish that the stitching is functional. *Blairmore Knitwear Corp. et al. v. United States*, 60 Cust. Ct. 388, C.D. 3396, 284 F. Supp. 315 (1968). However, defendant confuses the conclusiveness of necessity under the statutory test of "functionality" with the test of functionality itself. For, under defendant's reasoning, a shirt with pockets would be considered ornamented by virtue of the pockets alone because pockets are unnecessary for a shirt to function as a shirt. There is a basic difficulty with this reasoning, however, since the question is not whether the "upper" is functional with or without the stitching but whether the "stitching" is functional. Thus, defendant is incorrect in its assertion that the question of utility, and hence the functionality, of the stitching "depends upon its necessity." Brief, p. 5.

In short, the facts unequivocally established by the tests performed for both parties prove that arch stitching makes the fabric of the upper stronger and hence results in a stronger shoe. Furthermore, according to the witnesses responsible for the design of the shoe in issue, this was the purpose for which the arch stitching was employed.

It is also interesting to note that the Customs Service, in several published Treasury decisions, has ruled that portions of a garment which simulate a functional element of the garment do not "ornament" that garment. For example, dummy or false pocket flaps which were sewn on each side at the waistline, which flaps simulate a flap that actually would cover each pocket and which were not more decorative than a utilitarian flap were held to be not ornamental. 100 T.D. 221, 232, T.D. 56410(46) (1965). Further, simulated pockets and belt segments (100 T.D. 802, 838, T.D. 56535(168) (1965)) and eight metal buttons sewn to the front of a woman's sleeveless dress to simulate a double-breasted effect (4 CUSTOMS BULLETIN 93, 96, T.D. 70-43(15) (1970)) did not cause the garment on which each of these simulated utilitarian embellishments was placed to be ornamental.

In line with these Treasury decisions, it is to be observed that quite apart from the fact that the record establishes that the arch stitching strengthens the imported uppers, defendant's witnesses themselves have reiterated that that stitching simulates functional stitches.<sup>6</sup>

#### *The Arch Stitching is not Ornamental*

It is also concluded that the arch stitching is not ornamental within the meaning of that term as set forth in headnote 3(a)(i)(B) to schedule 3, TSUS. With regard to this headnote, the court stated in *Blairmore Knitwear Corp. v. United States*, *supra*, 60 Cust. Ct. at 392-3:

\* \* \* [W]hile the Headnote \* \* \* purports to define the term "ornamented", it does not actually do so. Instead it sets forth the circumstances under which fabrics and articles may be considered to be ornamented, and the types of embellishments which may accomplish that effect. As is evidenced by the introductory language, the emphasis is upon the article to be adorned or embellished, not the substantive matter of what constitutes ornamentation in the first instance.

\* \* \* \* \*

*The intent to make adornment the primary objective of ornamentation is thus evidenced.*—It is clear both by this express statement and the exclusion in headnote 3(a), *supra*, of "functional stitching" that, in employing the word "ornamented", Congress did not attempt to label all braid, or all fringe, or all edging, for

<sup>6</sup> Thus, defendant's witness, Mr. McCarthy, testified that the arch stitching simulates an extra piece of fabric on the inside which in the past was an instep reinforcement designed to provide support to the arch. (R. 457-8.) To similar effect, defendant's witness Mr. Chase testified that the arch stitching on the imported uppers "simulates an additional reinforcement on the shoe, which, in fact, does not exist." (R. 368.)

example, ornamentation, but only such as in fact served to provide a decorative effect.

\* \* \* \* \*

Moreover, a distinction must be drawn between that which finishes, joins, serves a utilitarian purpose, and only incidentally ornaments, and that which primarily adorns, embellishes, or ornaments. [*Italic added.*]<sup>7</sup>

As the court stated in *Colonial Corp. of America v. United States*, 62 Cust. Ct. 502, 504-5, C.D. 3815 (1969):

\* \* \* The general rule is that whether or not an article is "ornamented" or "decorated" is a question of fact to be determined with reference to the particular article before the court. \* \* \* It is the results produced upon the article, and not the method of production, which determines the classification. \* \* \* Thus the important question is not what is the particular article being ornamented, but rather what is the effect on that article when some additional and nonfunctional feature is added to it.

It thus remains a question of fact as to whether or not the primary effect of the arch stitching is that of adornment or decoration. And reviewing the record before us in that light, it must be concluded that adornment or decoration is not the arch stitching's primary effect. Significant in this respect is Mr. McGowan's testimony that 80 percent of the sneakers in issue were white with white arch stitching and that since the arch stitching was also white, it was not readily visible. Examination of the sample supports this testimony. Furthermore, although the white arch stitching is readily visible on the black sneakers, its decorative effect is minimal because it is virtually identical in appearance to the other stitching on the upper, which is concededly nonornamental. In fact, defendant's witness Mr. McCarthy agreed that the arch stitching on the upper is "consistent with the overall design or motif of the upper." (R. 459.)

It is to be added that defendant's two witnesses testified that, in their opinion, the arch stitching on the imported upper was ornamental and not functional. Their views were based on a belief that in order to be functional, stitching must hold or bind two pieces of material together. However, as we have previously seen, this simply does not conform with the meaning of "functional" as applied to the facts of this case.

In summary, the merchandise is not "ornamented" because arch stitching is not ornamental. A visual inspection of the uppers in issue

<sup>7</sup> Webster's New International Dictionary (2d ed., 1956) defines ornament as follows:

2.a. That which is added to embellish or adorn; that which adds grace or beauty; an embellishment; a decoration.

4. Addition or inclusion of anything that beautifies; ornamentation; embellishment; decoration.

reveals that the arch stitches are not more visible or decorative or colorful than the other stitches on the uppers. And even if the utility of arch stitching had not been shown, it is clear from the cases which have treated the ornamentation issue that because arch stitching does not adorn or embellish the upper in a commercially meaningful manner, the stitch is not ornamental.

For example, in *United States v. Mutual China Co. et al.*, 9 Ct. Cust. Appls. 232, T.D. 38202 (1919), the court held that embossed configurations on certain crockery articles had not been brought to that degree of embellishment as to be "ornamented" or "decorated" within the statute. As the court stated: "Certainly neither every deviated line nor undulated surface can be said to be an ornamentation or decoration, although pleasing to the eye." *Id.* at 234.

Further, in *Will & Baumer Candle Co., Inc. v. United States*, 21 Cust. Ct. 149, C.D. 1146 (1948), the court held that three vertical lines on a glass receptacle (holding a candle used in connection with a sanctuary lamp) were not ornamental since they were not "substantial and sufficient to amount to an ornament or decoration." *Id.* at 152.

Clearly distinguishable is *Colonial Corp. of America v. United States*, *supra*, 62 Cust. Ct. 502, where a double row of nonfunctional reddish stitching placed on the back of girls' blue denim shorts was found to be ornamental. In that case, the stitching was eye catching; was conspicuous; and, even from a view of the sample, was obviously decorative. In the present case, by contrast, the arch stitching is not eye catching; is not conspicuous; and is not obviously decorative.

#### *Conclusion*

For the foregoing reasons, the court concludes that the imported uppers are, as claimed by plaintiff, properly classifiable under item 386.50 as "Articles not specially provided for, of textile materials: \* \* \* Other articles, not ornamented: Of cotton: \* \* \* Other," dutiable at the rate of 14 percent ad valorem. Judgment will be entered accordingly.

# Decisions of the United States Customs Court

## *Abstracts Abstracted Protest Decisions*

DEPARTMENT OF THE TREASURY, February 5, 1979.

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

ROBERT E. CHASEN,  
*Commissioner of Customs.*

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
P79/19	Ford, J. January 29, 1979	India Nepal, Inc.	78-9-01658	Par. or Item No. and Rate  Item 740.38 27.5% Item 653.35 9% Item 222.44 8.5%	Par. or Item No. and Rate  Error made in li- quidating entry K24845; mer- chandise in- voiced as copper pendant, brass collar, wood	Consent judgment	New York Copper pendant, brass collar, etc.

P79/20	Richardson, J. January 29, 1979	Bombardier, Ltd.	77-3-00423	Item 692.16 5%	bracelets and wood collars, ear- ring pendant, ear- ring wire wrap- ped is properly eligible for duty free treatment under Items A740.38, A653.35 and A322.44, TSUS, under the Generalized System of Pref- erences	Item 692.30 Free of duty	F. W. Myers & Company, Inc. v. U.S. (C.D. 4256, aff'd C.A.D. 1097)	Champlain-Rouses Point (Ogdensburg) Bombardier Muskeg Tractors
P79/21	Ford, J. January 31, 1979	Bombardier, Ltd.	75-1-00087	Item 692.35 5.5%	Item 692.30 Free of duty	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Buffalo-Niagara Falls (Buffalo) Skidder tractors
P79/22	Watson, J. January 31, 1979	Mountain Products Corp.	75-3-00759, etc.	Item 389.00 25¢ per lb. +15%	Item 735.20 10%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4948)	Seattle Backpacking tents
P79/23	Boe, J. January 31, 1979	United China & Glass Co.	70/44197, etc.	Item 544.51 26.5% or 23.5%	Item 688.40 8%	Item 688.40 8%	The Englishtown Corpora- tion v. U.S. (C.A.D. 1187)	Philadelphia Make-up mirror with lights

# Decisions of the United States Customs Court

## *Abstracts* *Abstracted Reappraisement Decisions*

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/11	Ford, J. January 29, 1979	International Seaway Trading Corp.	R61/3596	American selling price	\$1.53 less 6%, per pair	Agreed statement of facts	New York Footwear
R79/12	Ford, J. January 29, 1979	Skelton-Kohura & Co., s/o House of Adler, Inc. and House of Adler, Inc.	78-5-00855	Export value	Invoice unit values, less airmail, assay, and insurance charges, net packed	Judgment on the plead- ings	Honolulu Loose diamonds
R79/13	Richardson, J. January 29, 1979	Dixie Warehouse, Inc.	R62/38355	Cost of production	As specified in column titled "Claimed Value" on schedule at- tached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automomobiles
R79/14	Richardson, J. January 29, 1979	Patrick & Graves	R65/13696	Cost of production	As specified in column titled "Claimed Value" on schedule at- tached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automomobiles



R79/15	Richardson, J. January 29, 1979	Patrick & Graves	R65/23108	Cost of production	DM3383; DM3494.07; invoice unit value	U.S. v. F & D Trading Corp. (C.A.D. 1079)	Houston Volkswagen automobiles
R79/16	Richardson, J. January 29, 1979	Patrick & Graves	R67/1343	Cost of production	DM3500.97; DM3606.55; DM4298	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R79/17	Ford, J. January 31, 1979	Brother International Corp.	R64/23323	Export value	Appraised unit values less 7.5% net packed	Agreed statement of facts	New Orleans Sewing machine heads
R79/18	Ford, J. January 31, 1979	Bus and Truck Supply Co.	73-2-00502	Export value	Appraised values shown in red ink on invoices, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/19	Ford, J. January 31, 1979	Consolidated Sewing Machine Corp.	R64/14653, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Miami Sewing machine heads
R79/20	Ford, J. January 31, 1979	Trans World Industries, Inc.	R63/11849, etc.	Export value	Appraised unit values less 7.5% net packed	Agreed statement of facts	Los Angeles Sewing machine heads

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/21	Richardson, J. January 31, 1979	Bus and Truck Supply Co.	R66/23473	Constructed value	Amounts shown in column headed "Constructed Value" on schedule attached to decision and judgment, plus value determined on appraisal of components furnished to Bus and Car Co. without charge by Western Sales, Ltd., less amount of any damage allowed in appraisal, plus or minus any adjustments made on appraisal for components or parts added to or omitted from a particular shipment, and less value of components of U.S. origin	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/22	Richardson, J. January 31, 1979	B. Kuppenheimer & Co., Inc.	R65/2504, etc.	Constructed value	Appraised values less \$0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	Chicago "Elastic fabric," "Elastic Webbing," etc.
R79/23	Newman, J. January 31, 1979	Ernest Lowenstein, Inc.	R66/7753	Export value	Invoiced unit prices less 2.845%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glass stones, pendants, beads, etc.

## Appeal to United States Court of Customs and Patent Appeals

APPEAL 79-14.—Pistorino & Co., Inc. v. United States.—BEAM CUTTING MACHINES—MACHINES, NSPF, and PARTS—SHOE MACHINERY AND PARTS—TSUS. Appeal from C.D. 4779.

In this case merchandise invoiced as electrohydraulic beam cutting machines or electrohydraulic beam presses was held properly dutiable as assessed at 5 percent ad valorem under the provision in item 678.50, Tariff Schedules of the United States, as modified by T.D. 68-9, for machines not specially provided for, and parts thereof. Plaintiff-appellant claimed that the merchandise should be duty free under item 678.10, TSUS, as shoe machinery and parts thereof.

It is claimed that the Customs Court erred in finding and holding that the merchandise was dutiable under item 678.50, supra; in not finding and holding that the merchandise was properly classifiable under item 678.10, supra; in finding and holding that the merchandise did not belong to a class or kind of merchandise commonly known as shoe machinery; in not finding and holding that the merchandise belonged to a class or kind of beam cutters which were chiefly used at the dates of importation as shoe machinery; in finding and holding that the merchandise belongs to a general class or kind of beam cutters; in finding and holding that the plaintiff failed to establish the chief use of the merchandise as shoe machinery and parts thereof; in finding and holding that the merchandise belongs to a general class of beam cutters used by a variety of industries, and not to a class or kind chiefly used in the shoe industry; in not following the incorporated case, *C. H. Powell Company v. United States*, 63 Cust. Ct. 302, C.D. 3912 (1969); and in distinguishing the incorporated case from the case at bar.

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